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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 368.

MARY MABEL ROGERS, APPELLANT,

vs.

HENRY H. PECK AND WILSON S. LOVELL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

FILED AUGUST 7, 1905.

(19870.)

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1 United States District Court, District of Vermont.

In re Mary Mabel Rogers, habeas corpus.

Be it remembered: That on the 21st day of June, A. D. 1905, Mary Mabel Rogers, of Hoosick, in the county of Rensselaer and State of New York, filed her petition in said court, praying therein that a writ of habeas corpus might issue to bring her said body before the Honorable Hoyt H. Wheeler, judge of the District Court of the United States, within and for the district of Vermont, upon which said petition a writ of habeas corpus was issued, as prayed for, on the 19th day of June, A. D. 1905; which said petition and writ of habeas corpus, with the officer's return thereon, are in the words and figures following:

2 *To the honorable District Court of the United States in and for the District of Vermont, and to Honorable Hoyt H. Wheeler, judge of the said District Court:*

Your petitioner, Mary Mabel Rogers, of Hoosick, in the county of Rensselaer and State of New York, respectfully shows to your honor and to your honorable court, that she is now a prisoner confined in the State prison at Windsor, in the county of Windsor, and State of Vermont, in the custody of Henry H. Peck, sheriff of said county of Windsor, and of Wilson S. Lovell, superintendent of the State prison aforesaid, for an alleged criminal offence, to wit, the crime of murder in the first degree.

Your petitioner shows that her said confinement is by virtue of three certain warrants, copies whereof are in the possession of the said sheriff and said superintendent of said prison, of none of which said warrants your petitioner now has any copy, nor has she ever been served with nor had any copy.

But your petitioner avers, to the best of her knowledge and belief, that she is not committed nor detained by virtue of any process of law known to the courts of the United States, or the several States, but that she is now detained in violation of the Constitution of the United States, in violation of the laws of the United States; and in violation of the constitution and laws of the State of Vermont; and that she is not held in confinement by virtue of any final judgment and decree of any competent court or tribunal of criminal jurisdiction, or by virtue of any process issued upon said judgment or decree, but is held without due process of law.

And your petitioner avers that at the time of her said arrest she was a citizen and resident of the State of New York, and that she was arrested in the town of Bennington in the county of Bennington, on or about
3 the 14th day of August A. D. 1902, and that she was tried in the County Court, within and for the county Bennington, in the State of Vermont, at a term thereof holden in Bennington aforesaid, in December, 1903, upon an indictment found by the grand jury of said county of Bennington at a term of said County Court holden in June, A. D. 1903, which said indictment charged her with the crime of murder in the first degree; and that upon said trial at said term a verdict and judgment that your petitioner was guilty as charged in said indictment, and your petitioner was thereupon then and there by said court sentenced to be hanged by the neck until dead, and it was then and there ordered that said sentence be executed on the first Friday in February, A. D. 1905.

And your petitioner avers that on and after the said first Friday in February, A. D. 1905, she was detained by the said petitionees by virtue of a certain pretended order and warrant issued by Charles J. Bell as governor of the State of Vermont, and which commanded the said petitionee, Henry H. Peck, to hang and kill your petitioner on the second day of June, A. D. 1905; and since said last-named date she has been and is now held and restrained by the petitionees by virtue of another certain pretended warrant, issued by said governor of Vermont, and not upon the request or with the knowledge of your petitioner, and which commands the said sheriff to hang and kill your petitioner on the 23rd day of June, A. D. 1905; that neither of said pretended warrants or orders is issued by any court of competent jurisdiction under the laws of Vermont or under the laws of the United States, and neither of said pretended warrants is authorized by any statute or law, or by the Constitution of either the State of Vermont or of the United States.

4 Your petitioner further avers that said petitionee's are now restraining her of her liberty and threaten to and intend to deprive her of her life on the 23rd day of June, A. D. 1905, solely by virtue of said pretended warrants, and that in so doing the petitionees are depriving your petitioner of life and liberty without due process of law, and depriving your petitioner of the rights and privileges protection guaranteed to her by the Constitution of the United States.

Your petitioner further avers that, under and by virtue of chapter 98 of the Vermont Statutes and prior to the second day of June, A. D. 1905, she did bring her petition for a new trial and did present said petition to two judges of the Supreme Court of the State of Vermont, who upon examination thereof did allow the same to be filed; but said judges did not make at that time or at any other time any order staying the execution of said sentence until after the time fixed for hearing the petition by the said Supreme Court of Vermont.

Your petitioner further avers that her said petition was duly heard and considered by the Supreme Court of Vermont, and said court did refuse a new trial and did dismiss said petition; but said Supreme Court did not then nor hath it ever appointed a time for executing said sentence and has never issued its warrant to the sheriff of Windsor County for that purpose, as required by said chapter 98. Your petitioner insists that she had the right to be heard as to the day when said sentence was to be executed, which right has been denied her; wherefore she now insists that she is being deprived of her liberty and is threatened with death without due process of law as contemplated by the Constitution of the United States.

Your petitioner avers that she is unable to procure at this time
5 copies of said pretended warrants, but prays that the same may be made a part of this petition and thereto attached when they can be procured.

And your petitioner further shows that the said County Court in and for the county of Bennington, in which she was convicted as aforesaid, is a court of inferior jurisdiction and not one authorized by law to try and finally determine questions of law arising upon trials therein, and that after her said trial, on or about the 20th day of January, A. D. 1904, said court adjourned without day.

That the provision of the law of the State of Vermont relative to the passing of causes to the Supreme Court from County Courts for the decision and determination of questions of law is as follows:

Sec. 1961. "Questions of law decided by the County Court, arising upon demurrer, trial by jury, or motion in arrest, in a prosecution by indictment or information for a crime or misdemeanor, shall, after a verdict of guilty is returned, upon motion of the respondent, be allowed and placed upon the record; and the same shall thereupon pass to the Supreme Court for final decision."

And by the law of Vermont it is further provided as follows:

Sec. 1965. "No writ of error shall be allowed in a criminal cause prosecuted by complaint, information, or indictment."

And your petitioner shows that no other or different provision was or is made by the law of the State of Vermont for the review, settlement, and determination by the Supreme Court of questions of law raised in the County Courts than the provision of section 1961 aforesaid.

And your petitioner avers that at said trial in the Bennington County Court the principal witness against her was one Leon Perham, and that he was the only witness who, in his testimony, gave evidence directly tending to show that your petitioner committed said crime; that upon said trial said Perham refused to submit to cross-examination, and by reason of such refusal he was not cross-examined, as fully
6 appears by the transcript of the testimony made by the official reporter of said court, and notwithstanding his said refusal his testimony was, by said court, submitted to the jury without any limitation or instruction from said court on account of said refusal and lack of cross-examination.

And your petitioner avers that she was without experience, ignorant of her rights in that behalf, unable to understand the same, and that by reason of her lack of mental capacity and understanding she did not, up to and at the time of the adjournment of said court aforesaid, know or understand that said proceeding of said County Court was unlawful and in derogation of her rights under the Constitution of the United States.

Your petitioner further shows that she is being deprived of her life and liberty without due process of law; and her rights, privileges, and immunities are being, and are abridged, by the laws of the State of Vermont, in violation of the Constitution of the United States, in that she is about to be executed by the order of the governor of said State upon a pretended warrant fixing the time of execution without authority of law, and without giving your petitioner an opportunity to be heard thereon or to be confronted with the witnesses against her.

That the said sheriff and superintendent claim to be acting by virtue of said warrant fixing the time to carry out the sentence of the County Court of the county of Bennington on a judgment of said court rendered at the December term, A. D. 1903, in which the execution of the petitioner was fixed on the 3d day of February, A. D. 1905; which said war-
7 rant is void for that it has expired and the time of execution has already elapsed; that said County Court is an inferior court, without jurisdiction to finally determine questions of law raised on said trial, and no other court or tribunal is established or provided by law as required by the Constitution in said county where the petitioner may be heard upon such questions or in respect thereto.

That the County Court, by sec. 1010, has original jurisdiction of prosecution of criminal offences within the respective counties. The Supreme Court is the appellate court, and by sec. 993 has jurisdiction to try and determine questions of law removed from the County Court pursuant to law. The constitution of Vermont, by sec. 4, of Chap. II, provides that courts of justice shall be maintained in every county in this State. The legislature has provided no court of justice for trial of questions of law removed from the County Court, in said county of Bennington, and although by sec. 1961 it is provided that questions of law decided by the County Court may, on motion, be allowed, and pass to the Supreme Court, the legislature has enacted by sec. 1965 that no writ of error shall be allowed in a criminal cause prosecuted by indictment, and that Supreme Court shall be held at Montpelier without said county; that each County Court ceases to exist on adjournment, and said County Court has adjourned and the petitioner is prevented by said laws from a review of the record and a complete trial under the Constitution.

And the petitioner by the acts of the legislature aforesaid, and by the failure to provide a Supreme Court or some other suitable competent tribunal in the county of Bennington before which questions of law raised in said County Court, and the nature of the judgment and sentence, in a manner suited to the nature of the case and the punishment imposed, can be heard, has been and is deprived of the privileges secured by the Constitution of the United States, and of her liberty and life without due process of law.

8 And your petitioner further shows that the Supreme Court of the State of Vermont is bound by said statute, sec. 1965, and that said court being the court of last resort and for the ultimate determination of questions of law, can not and will not entertain a writ of error in any criminal cause, and therefore this petitioner is wholly unable to procure any writ of error or any other process by which the appellate court of said State can review and decide upon the question of whether said Bennington County Court erred in the conduct of her said trial, although as your petitioner is advised and believes, said court did err in the respect above set forth, and that the means whereby your petitioner might, of right, have procured a determination of said question by the court of last resort in said State of Vermont has been taken away by said statute, sec. 1965. That the right to have and procure such determination in a capital or other criminal case is one which existed and was of general and common right at the time of the adoption of the Constitution of the United States, and is guaranteed and conferred by said Constitution, and that said statute of Vermont, sec. 1965, abrogates said right and is in conflict with said Constitution of the United States, and that the proceedings against your petitioner, in view of said statute, are not due process of law.

Wherefore your petitioner prays a writ of habeas corpus to the end that she may be discharged from custody and may be allowed to depart from said unlawful imprisonment and detention aforesaid, and for a writ of certiorari to bring up the record of said cause.

Dated at Windsor, in the County of Windsor, this 19th day of June, A. D. 1905.

MARY MABEL ROGERS.

9 STATE OF VERMONT,
Windsor County, ss:

At Windsor, in said county, this 19th day of June, A. D. 1905, personally appeared the said Mary Rogers, and made oath that she has heard read the foregoing petition by her subscribed, and that the facts stated therein are true, and that as to the facts on information and belief she believes them to be true.

Before me, EDWARD B. FLINN,
Notary Public.

F. M. BUTLER,
T. W. MOLONEY,
E. B. FLINN,
Attorneys.

President of the United States of America, to Henry H. Peck and Wilson S. Lovell, or to ————:

You are hereby commanded that you have the body of Mary Mabel Rogers, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatever name said Mary Mabel Rogers shall be called or charged, forthwith before me at the court-house in Windsor, to do and receive what shall then and there be considered concerning the said Mary Mabel Rogers, and have you there this writ.

Witness the Hon. Hoyt H. Wheeler, judge of said court, the 19th day of June, A. D. 1905.

HOYT H. WHEELER, *Judge.*

———— ————,
Attorneys.

Let the writ issue.

10 UNITED STATES OF AMERICA,
District of Vermont, ss:

At Windsor, in said district, on this the 20th day of June, A. D. 1905, I made service of the within petition and summons on the within-named Wilson S. Lovell, supt. of the Vermont State prison, by delivering into his hands a true and attested copy hereof, with my return hereon thereon endorsed.

Attest:

HORACE W. BAILEY,
U. S. Marshal.

UNITED STATES OF AMERICA,
District of Vermont, ss:

At Windsor, in said district, on this day of June, A. D. 1905, I made service of the within petition and summons on the within-named Henry H. Peck, by delivering into his hands a true and attested copy hereof with my return hereon thereon endorsed.

Attest:

HORACE W. BAILEY,
U. S. Marshal.

(Endorsed:) Filed June 21st, 1905. Geo. E. Johnson, clerk.

And on the same 21st day of June, A. D. 1905, the returns of Henry H. Peck and Wilson S. Lovell to said writ of habeas corpus were filed in said cause, which said returns are in the words and figures following:

11 *To Honorable Hoyt H. Wheeler, judge of the District Court of the United States, in and for the District of Vermont:*

Henry H. Peck, of Hartford, in the county of Windsor and State of Vermont, makes this his return to the writ of habeas corpus to him directed, issued by your honor on the 19th day of June, 1905, wherein and by said writ he, the said Peck, is commanded to have the body of Mary Mabel Rogers, by him imprisoned and detained, as it is said, together with the time and cause of said imprisonment and detention before your honor forthwith, at the court-house in Windsor in the said County of Windsor, to do and receive what shall then and there be considered concerning the said Mary Mabel Rogers, and thereupon says:

That he has not in his custody and control and has not now and never has imprisoned or detained the said Mary Mabel Rogers; that the said Mary Mabel Rogers is now imprisoned and detained in the State prison of the State of Vermont, at said Windsor, under and by virtue of the mittimus issued by the honorable County Court, within and for the county of Bennington and State of Vermont, on the first day of January, 1904, she, the said Mary Mabel Rogers, having been committed to said prison on the second day of January, 1904, there to be confined and kept according to the laws of the State of Vermont, to await the execution by the hand of the sheriff of the county of Windsor and State of Vermont, all as recited in the warrant to said sheriff directed, hereinafter referred to.

That your respondent is now and has been since December 1, 1904, the sheriff of the county of Windsor and State of Vermont, duly elected and qualified as such under and by virtue of the constitution and

12 laws of the State of Vermont.

That on the second day of January, 1905, there was issued by the honorable County Court, within and for the county of Bennington, under the seal of said court and attested by the clerk of said court, a warrant directed to your respondent, as said sheriff of said county of Windsor, a copy of which warrant is annexed to and made a part of this return.

That on the second day of February, 1905, at Montpelier, in the county of Washington and State of Vermont, there was issued by the Honorable Charles J. Bell, governor of the State of Vermont, under and by virtue of the power and authority vested in the governor of the State of Vermont by the constitution of the State of Vermont, a warrant directed to the sheriff of the said county of Windsor and State of Vermont, granting unto the said Mary Mabel Rogers a reprieve of and from the sentence of death of said court, as set forth and commanded in said warrant, to and until the second day of June, 1905, to and until between the hours of one and two o'clock in the afternoon of said second day of June, 1905, all as appears in the copy of said warrant of reprieve which is annexed to and made a part of this return, and which said warrant of reprieve was duly delivered to your respondent on said second day of February, 1905; that on the first day of June, 1905, at said Montpelier, there was issued by the Honorable Charles J. Bell, governor of the State of Vermont, under

and by virtue of the power and authority vested in the governor of the State of Vermont by the constitution of the State of Vermont, a warrant directed to the sheriff of the said county of Windsor, granting unto the said Mary Mabel Rogers a further reprieve from the said sentence of death to and until the 23d day of June, 1905, to and until between the hours of one and two o'clock in the afternoon of said 23d day of June, 1905, which said warrant of reprieve was on said first day of June, 1905, duly delivered to your respondent as the sheriff of the county of said Windsor, and a copy of which said warrant of reprieve is annexed
13 to and made a part of this return.

And your respondent here has no personal knowledge as to the manner in which the relator has been confined in said prison since November 2nd, 1904, except that he, your respondent here, has visited her in said prison on four different occasions before the commencement of this proceeding, but that your respondent here has heard read the statement of Respondent Lovell, made in his return to this writ, and understands and believes the statement of facts therein contained as to the manner and place of confinement of the relator and character and frequency of visits to her is substantially correct.

That your respondent plans and purposes on said 23d day of June, 1905, between the hours of one and two o'clock in the afternoon of said day, unless before that time there shall issue to him from some court of competent authority or from the governor of the State of Vermont, a reprieve, stay, supersedeas, order, mandate, or decree directing him to the contrary, to execute and carry out upon the body of the said Mary Mabel Rogers the sentence of death of the said Bennington County Court, as recited and set forth in said warrant, and as commanded in said last-named reprieve, all according to the laws of the State of Vermont.

And that except under and by virtue of the said warrant from said Bennington County Court and said warrants of reprieve from the governor of the State of Vermont, he, your respondent, has no plan nor purpose to interfere with the body of the said Mary M. Rogers, nor to exercise any custody or control over her, the said Mary M. Rogers.

Dated June 21, 1905.

Attest:

HENRY H. PECK.

DISTRICT OF VERMONT, *ss:*

At Brattleboro, in said district, this 21st day of June, 1905, personally appeared Henry H. Peck and made oath that the foregoing return subscribed by him is true.
14 Before me,

GEO. E. JOHNSON,
Clerk U. S. District Court, Dist. Vt.

STATE OF VERMONT,
Bennington County, ss:

To HENRY H. PECK, Esquire, *sheriff of the county of Windsor, in the State of Vermont, the honorable the County Court within and for the county of Bennington aforesaid sends greeting:*

Whereas, Mary M. Rogers, of Bennington, in the county of Bennington and State of Vermont, by the consideration and judgment of the

honorable the County Court, begun and held at Bennington, within and for said county of Bennington, on the first Tuesday of December, in the year of our Lord one thousand nine hundred and three, was duly convicted of the crime of murder in the first degree, and was then and there sentenced by said court in session in the following words; that is to say:

"The sentence of the court is that you, the said Mary M. Rogers, on the first Friday of February, 1905, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed yard of the State prison in Windsor, in the county of Windsor, be hanged by the neck till dead. And it is ordered that a warrant be issued by the clerk of the County Court within and for the county of Bennington, under the seal of said court, to the sheriff of said Windsor County, commanding said sheriff to cause said sentence to be carried into effect.

"And it is also the sentence of this court that in the meantime you, the said Mary M. Rogers, be confined in said State prison, at hard
15 labor therein, till within three months of said time fixed for said execution; and for and during said three months next prior to said time fixed for the execution, and up to said execution, you, the said Mary M. Rogers, be confined in solitary confinement in said State prison."

Now, therefore, by the authority of the State of Vermont, you are hereby commanded that upon the first Friday in February next, in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed yard of the State prison in Windsor, in the county of Windsor, you cause execution of said sentence of said honorable court, in all respects to be done and performed upon the body of the said Mary M. Rogers, agreeably to the statute laws of the State of Vermont, and for so doing this shall be your sufficient warrant.

Given under my hand, pursuant to the order and under the seal of said honorable County Court at Bennington, in the county of Bennington aforesaid, this second day of January, in the year of our Lord one thousand nine hundred and five.

[SEAL.] HARRY T. CUSHMAN, *Clerk.*

To the sheriff of the County of Windsor and State of Vermont, greeting:

Whereas Mary M. Rogers, of Bennington, in the county of Bennington and State of Vermont, was, by the consideration and judgment of the honorable County Court in and for the county of Bennington and State of Vermont, begun and held at said Bennington on the first Tuesday of December, 1903, duly convicted of the crime of murder in the first degree, to wit, the murder of Marcus M. Rogers, on the 12th day of August, 1903, and was in said court then and there sentenced by said court in session in the following words, to wit:

16 "The sentence of the court is that you, said Mary M. Rogers, on the first Friday of February, in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed yard of the State prison at Windsor, in the county of Windsor, be hung by the neck until dead. And it is ordered that a warrant be issued by the clerk of the County Court within and for said county of Bennington, under the seal of said court, to the said sheriff of said county of Windsor,

commanding said sheriff to cause said sentence to be carried into effect. And it is also the sentence of this court that in the meantime you, said Mary M. Rogers, be confined in said State prison at hard labor therein until within three months of the said time fixed for said execution and for and during three months next prior to the time fixed for said execution, and up to said execution you, the said Mary M. Rogers, be confined in solitary confinement in the said State prison."

And whereas under and by virtue of the said judgment and sentence of the said court, there was, by the clerk of the said court and under the seal of the said court, on January 1, 1904, duly issued a mittimus directed to the said sheriff of the said county of Bennington, therein reciting said judgment and sentence of said court, and commanding him, the said sheriff of said Bennington County, to take the body of the said Mary M. Rogers and her to commit to the said State prison at said Windsor, there to stand to and abide the judgment and sentence of said court as aforesaid. And whereas by virtue of said mittimus the sheriff of the county of Bennington did, on, to wit, January 2, 1904, take the body of the said Mary M. Rogers and her commit to the said State prison at the said Windsor.

And whereas on, to wit, the 2nd day of January, 1905, there was issued by the clerk of said County Court of said county of Bennington,
17 and under the seal of said court, a warrant directed to the said sheriff of the said county of Windsor, therein reciting the said judgment and sentence of said court as hereinabove set forth and by the authority of the State of Vermont commanding the said sheriff that upon the first Friday of February next, in the year of our Lord one thousand nine hundred and five, between the hours of on and two o'clock in the afternoon of the said day, within the walls of enclosed yard of the said State prison of said Windsor, to cause execution of said sentence of the said honorable court in all respects to be done and performed upon the body of her, the said Mary M. Rogers, agreeably to the provisions of the law of Vermont:

Now, therefore, I, Charles J Bell, governor of the State of Vermont, under and by virtue of the power and authority vested in me by the constitution of the State of Vermont, do hereby grant to and unto the said Mary M. Rogers a reprieve of and from the said sentence of death of said court as above set forth to and until Friday, the 2nd day of June, 1905, to and until between the hours of one and two o'clock in the afternoon of the said 2nd day of June, 1905, when and whereupon you shall in all respects execute and carry out the judgment and sentence of death of said court, as hereinabove set forth.

Given under my hand and the seal of the State of Vermont at Montpelier this 2nd day of February, in the year of our Lord one thousand nine hundred and five and in the year of the Independence of the United States the one hundred and twenty-ninth.

[SEAL.] C. J. BELL, *Governor.*

By the governor:

CHARLES T. WALTER,
Secretary of Civil and Military Affairs.

17½ (Indorsed:) Reprieve of Mary M. Rogers, February 2, 1905, to June 2, 1905.

18 *To the sheriff of the county of Windsor and State of Vermont, greeting:*

Whereas Mary M. Rogers, of Bennington, in the county of Bennington and State of Vermont, was, by the consideration and judgment of the honorable County Court in and for the county of Bennigton and State of Vermont, begun and held at said Bennington on the first Tuesday of December, 1903, duly convicted of the crime of murder of Marcus M. Rogers on the 12th day of August, 1903, and was in said court then and there sentenced by said court in session in the following words, to wit:

"The sentence of the court is that you, said Mary M. Rogers, on the third day of February, in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed walls of the State prison at Windsor, in the county of Windsor, be hung by the neck until dead. And it is ordered that a warrant be issued by the clerk of the County Court within and for said county of Bennington, under the seal of said court, to the said sheriff of said county of Windsor, commanding said sheriff to cause said sentence to be carried into effect. And it is also the sentence of this court that in the meantime you, said Mary M. Rogers, be confined in said State prison at hard labor therein until within three months of the said time fixed for said execution, and for and during three months next prior to the time fixed for said execution, and up to said execution, you, the said Mary M. Rogers, be confined in solitary confinement in the said State prison."

And whereas under and by virtue of the said judgment and sentence of the said court, there was, by the clerk of the said court, and under the seal of said court, on January 1, 1904, duly issued a mittimus directed to the said sheriff of the said county of Bennington, therein reciting said judgment and sentence of said court, and commanding him, the said sheriff of said Bennington County, to take the body of the said Mary M. Rogers and her to commit to the said State prison at said Windsor, there to stand to and abide the judgment and sentence of said court as aforesaid. And whereas by virtue of said mittimus, the sheriff of the county of Bennington did, on, to wit, January 2, 1904, take the body of the said Mary M. Rogers and her commit to the said State prison at said Windsor.

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And whereas on, to wit, the 2nd day of January, 1905, there was issued by the clerk of said County Court of said county of Bennington, and under the seal of said court, a warrant directed to the said sheriff of the said county of Windsor, therein reciting the said judgment and sentence of said court, as hereinabove set forth, and by the authority of the State of Vermont commanding the said sheriff that upon the first Friday of February then next in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of the said day, within the walls or enclosed yard of the said State prison at said Windsor he cause execution of the sentence of the said honorable court in all respects to be done and performed upon the body of her the said Mary M. Rogers, agreeably to the provisions of the law of Vermont. And whereas I, Charles J. Bell, governor of the State of Vermont, under and by virtue of the power and authority vested in me by the constitution of the State of Vermont, did, on the

2nd day of February, in the year of our Lord one thousand nine hundred and five, under my hand and the seal of the State of Vermont, grant to and unto the said Mary M. Rogers a reprieve of and from the said sentence of death of said court, as above set forth, to and until Friday, the 2nd day of June, 1905, to and until between the hours of one and two in the afternoon of the second day of June, 1905, with the order and direction therein that then and thereupon on said second day of June, 1905, you should in all respects execute and carry out the judgment and sentence of death of said court, as hereinabove set forth, and which reprieve did fully set forth the judgment and sentence of death of said court, all as hereinabove set forth.

Now, therefore, I, Charles J. Bell, governor of the State of Vermont, under and by virtue of the power and authority vested in me by the constitution of the State of Vermont, do hereby further grant to and unto the said Mary M. Rogers a reprieve to and from the said sentence of death of said court, as above set forth, to and until the twenty-third day of June, 1905, to and until between the hours of one and two o'clock in the afternoon of the said Friday the 23d day of June, 1905, when and whereupon you shall in all respects execute and carry out the judgment and sentence of death of said court, as hereinabove set forth.

Given under my hand and the seal of the State of Vermont at Montpelier, this first day of June, in the year of our Lord one thousand nine hundred and five, and in the year of the Independence of the United States the one hundred and twenty-ninth.

C. J. BELL, *Governor.*

By the Governor:

CHARLES T. WALTER,
Secretary of Civil and Military Affairs.

(Endorsed:) Filed June 21, 1905. Geo. E. Johnson, clerk.

To Honorable Hoyt H. Wheeler, judge of the District Court of the United States in and for the District of Vermont:

Wilson S. Lovell, of Windsor, in the county of Windsor and State of Vermont, makes this, his return, to the writ of habeas corpus to him directed (he therein being erroneously called William S. Lovell), issued by your honor on the 19th day of June, 1905, wherein and by said writ, he, the said Lovell, is commanded to have the body of Mary Mabel Rogers, by him imprisoned and detained, as it is said, together with the time and cause of said imprisonment and detention, before your honor forthwith at the court-house in Windsor, in the said county of Windsor, to do and receive what shall then and there be considered concerning the said Mary Mabel Rogers, and thereupon says:

That the said Mary Mabel Rogers is in his custody and by him imprisoned and detained at the State prison of the State of Vermont, at said Windsor. That your respondent here is the superintendent and keeper of the said State prison and in charge and control thereof, and has been such superintendent and keeper in charge and control thereof under and by authority of the laws of the State of Vermont since the 1st day of April, 1905. That when your respondent on first day of April, 1905, entered into his duties as said superintendent and keeper of said State prison,

and entered into the control and charge of the said State prison, he found confined therein the said Mary Mabel Rogers, and found her name enrolled upon the official records of said prison, as a prisoner therein, and found in the files in the office of said prison kept as required by law, a certain copy of a certain mittimus issued by the honorable County Court, within and for the county of Bennington and State of Vermont, duly served by H. S. Willson, sheriff of the said county of Bennington, all as
22 appears by the copy of said mittimus and copy of said return which is annexed to and made a part of this return; and that he further found in the said files of said prison office a certified copy of a certain reprieve granted unto the said Mary Mabel Rogers of and from the sentence of death of said court, as recited in said mittimus, all under the hands of Charles J. Bell, governor of the State of Vermont, and under the seal of the State of Vermont, a true copy of which reprieve is hereunto annexed and made a part of this return; and that on the first day of June, 1905, there was delivered to your respondent by Charles T. Walter, secretary of civil and military affairs of the State of Vermont, a certain certified copy of a further reprieve unto the said Mary Mabel Rogers of and from the said sentence of death of said court, as recited in said mittimus, a copy of which said further reprieve is annexed to and made a part of this return; and your respondent now holds the said Mary Mabel Rogers in his custody and control, to wit, imprisoned in said State prison, solely and only by virtue of said copy of said mittimus and said copies of said reprieves, as above set forth, and under and by virtue of no other authority, claim, or right, and that he holds her, the said Mary Mabel Rogers, *sp* in custody and control, to wit, so imprisoned in said State prison, to await the execution of the sentence of death upon her, as recited in said mittimus and in said reprieve, all according to the constitution and laws of the State of Vermont.

That when your respondent here so entered into charge and control of said prison, as superintendent and keeper thereof, as hereinbefore recited, he found the relator, the said Mary Mabel Rogers, confined in a room in the woman's ward of said State prison; said room being on the outer westerly wall thereof, being a room as your respondent estimates, twelve feet square, with two outside windows thereto, from one of which windows a view can be had of quite a portion of the westerly portion of State
23 street in said Windsor; that up to the time of this proceeding the said relator has not to my knowledge been out of said room since your respondent so took charge and control of said prison as keeper, as aforesaid, except on one occasion for a short time to consult with a priest; that said room has one double door opening into the corridor, with double locks thereon, and iron bars at the windows thereof; that since your respondent so became keeper of said prison, to wit, April 1st, 1905, the relator, Mary Mabel Rogers has been visited in said room by one Miss Durkee, the matron of said prison, a number of times each day, to wit, twelves times each day, according to the best judgment and belief of your respondent here, and on frequent occasions the said matron has remained in said room with the relator, visiting with her and conversing with her, sometimes for a few minutes and sometimes for as much as an hour at a time; all up to June 10th, 1905; that during said time from said April 1st to June 10, 1905, another female, an assistant to said

matron, has frequently visited the said room and conversed with said prisoner on an average of two or three times each day; that during said time the relator has been visited by the priest or chaplain at least once each week; that on June first, 1905, the relator was visited in her room by your respondent, together with the sheriff of the county of Windsor and the State's attorney of said county of Windsor and another person, not an official, at which times notice was given to the relator of the second reprieve herein referred to, and which was the purpose of said visit; that during that time she has had at frequent intervals literature consisting of magazines and religious periodicals, and occasionally a newspaper.

That since June 10th, 1905, until the commencement of this proceeding, there has been constantly present with the relator a female person as guard of her, and she has once since June 10th and before the commencement of this proceeding been visited by her mother and sister.

24 That your respondent here has no personal knowledge concerning the confinement of the relator previous to said April 1st, 1905, but that he understands and believes that since November 2, 1904, the relator has been kept in confinement in substantially the same manner, and has been visited and seen by other persons to substantially the same extent and in substantially the same manner as she has since April 1st, 1905.

Supt. W. S. Lovell deposition:

Examined by Mr. MALONEY.

Ques. Mr. Lovell, has this petitioner, since you have had to do with the prison, been in solitary confinement?

A. That is what we call solitary confinement.

Ques. You have calculated to confine her in solitary confinement?

A. It is what we call solitary confinement, I suppose.

Ques. (By Mr. FITTS.) All in the manner as you have specifically set forth in the paper just read?

A. Yes; I calculated to have it show there plainly how she is situated. I think I have set it forth truly, described the room, the surroundings, and of course I call it that she is in solitary confinement.

Ques. I suppose that is what you calculated to do—to follow out the statute?

A. Yes; what the statute requires.

Ques. I understood you yesterday to say that is what your return would be to such question—that she has been in solitary confinement.

A. That is what I call it—in solitary confinement.

Ques. That is your understanding and definition of the term?

A. Yes.

Ques. These persons you refer to as going to consult with her and visit her are her guards and death watch?

A. Yes. This Mrs. Durkee is matron, and she has a niece that works for us at the prison, and she, in case Mrs. Durkee wants anything, she would call her, and perhaps she would stay with her while she was gone for something, instead of locking the outside door.

25 Ques. And, as I understand you, not for the purpose of visiting her, but guarding and watching.

A. They are guards; yes, sir.

Ques. The guards have been on since the 10th day of June?

A. I think it was the 10th day of June.

Ques. (By Mr. FITTS.) Special guards have been on since the 10th day of June?

A. I think we put the deathwatch on ten days before the execution was to take place.

Ques. What you term deathwatch are guards, and they have constantly been with her since June 10th?

A. Yes; Mrs. Durkee goes on at 7.00 p. m. and off at 7.00 a. m. Miss Tuksbury is on for the rest of the time.

Ques. She is kept away from the rest of the prisoners?

A. Yes.

And your respondent brings here into court the body of the said Mary Mabel Rogers, as required in the said writ of habeas corpus, issued by your honor in the premises.

Dated June 21, 1905.

Attest:

WILSON. S. LOVELL.

DISTRICT OF VERMONT.

At Brattleboro, in said district, this 21st day of June, 1905, personally appeared Wilson S. Lovell and made oath that the foregoing return by him subscribed is true.

Before me,

GEO. E. JOHNSON,
Clerk U. S. District Court, District of Vt.

That when your respondent here so entered into charge and control of said prison, as superintendent and keeper thereof, as hereinbefore recited, he found the relator, the said Mary Mabel Rogers, confined in a room in the woman's ward of said State prison; said room being on the outer westerly wall thereof, being a room as your respondent estimates, twelve feet square, with two outside windows thereto, from one of which windows a view can be had of quite a portion of the westerly portion of State street, in said Windsor; that up to the time of this proceeding the said relator has not been out of said room since your
26 respondent so took charge and control of said prison as keeper, as aforesaid, but has been confined therein by me without opportunity to see or converse with others except keepers, except on one occasion for a short time to consult with a priest, when they stepped into another room within the prison and all the time remained in sight of keepers; that said room has one double door opening into the corridor, with double locks thereon and iron bars at the windows thereof; that since your respondent so became keeper of said prison, to wit, April 1st, 1905, the relator, Mary Mabel Rogers, has been guarded in said room by one Miss Durkee, the matron of said prison; that during said time, from April 1st to June 10th, 1905, a female assistant to said matron has been on guard a part of the time to assist and relieve said matron; that during said time the relator has been visited by the prison chaplain once each week; that on June 1st, 1905, this respondent went to said room or cell with the sheriff of the county of Windsor to read the reprieve of the governor,

hereto attached, and two other persons besides the matron were present; that she has had at frequent intervals literature, consisting of magazines and religious periodicals.

That since, on or about June 10th, 1905, until the commencement of this proceeding, there has been constantly present with the relator a female person as guard, who is called the death watch, and she has once, since June 10th and before the commencement of this proceeding, been visited by her mother and sister.

This respondent understands and believes that ever since November 2, 1904, the relator has been kept in confinement in the same manner as above described, which is solitary confinement, preparatory to the execution of a person condemned for murder under the statutes of the State of Vermont and according to the rules and usages of the State prison, and I am now holding the relator in such confinement.

WILSON S. LOVELL.

27 Subscribed and sworn to at Brattleboro, in said district, this 22nd day of June, 1905.

GEO. E. JOHNSON, *Clerk.*

STATE OF VERMONT,
Bennington County, ss:

To the sheriff of Bennington County or either of his deputies, greeting:

Whereas Mary M. Rogers, of Bennington, in the county of Bennington, aforesaid, before and by the consideration of the honorable the County Court, begun and held at Bennington, within and for said county of Bennington, on the first Tuesday of December, A. D. 1903, was duly convicted of the crime of murder in the first degree, for that the said Mary M. Rogers, at Bennington, in the county of Bennington, aforesaid, on the twelfth day of August, A. D. 1902, with force and arms did feloniously, wilfully, and of her malice aforethought kill and murder one Marcus M. Rogers, then and there, being contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the State.

And was thereupon by said court sentenced in the following words, namely:

"The sentence of the court is that you, the said Mary M. Rogers, on the first Friday of February, 1905, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed yard of the State prison in Windsor, in the county of Windsor, be hanged by the neck till dead. And it is ordered that a warrant be issued by the clerk of the County Court within and for the county of Bennington, under the seal of said court, to the sheriff of said Windsor County, commanding said sheriff to cause said sentence to be carried into effect.

"And it is also the sentence of this court that in the meantime you, the said Mary M. Rogers, be confined in said State prison at hard labor therein till within three months of said time fixed for said execution; and for and during said three months next prior to said time fixed for the execution and up to said execution, you, the said Mary M. Rogers, be confined in solitary confinement in said State prison."

Now, therefore, by the authority of the State of Vermont, you are hereby commanded to take the body of the said Mary M. Rogers and her commit to the keeper of the State prison at Windsor, in the county of Windsor, within said prison, who is hereby commanded to receive the said Mary M. Rogers and her confine within said State prison strictly
28 in compliance with said sentence of the court.

Fail not, but due service and return make according to law.

Dated at Bennington, in said county of Bennington, this first day of January, A. D. 1904.

HARRY T. CUSHMAN, *Clerk*

STATE OF VERMONT,
Bennington County, ss:

At Bennington, in said county, this 2nd day of January, 1904, I arrested the body of the within-named Mary M. Rogers, and on the same day at Windsor, in the county of Windsor, I committed the body of the said Mary M. Rogers to the keeper of the State prison at Windsor, in said county of Windsor, within said prison, and delivered to said keeper of said prison a true and attested copy of this mittimus with this, my return, thereon endorsed.

Attest.

H. S. WILSON, *Sheriff.*

A true copy. Attest.

H. S. WILSON, *Sheriff.*

To the sheriff of the county of Windsor and State of Vermont, greeting:

Whereas Mary M. Rogers, of Bennington, in the county of Bennington and State of Vermont, was, by the consideration and judgment of the honorable County Court in and for the county of Bennington and State of Vermont, begun and held at said Bennington on the first Tuesday of December, 1903, duly convicted of the crime of murder in
29 the first degree, to wit, the murder of Marcus M. Rogers, on the 12th day of August, 1903, and was in said court then and there sentenced by said court in session in the following words, to wit:

"The sentence of the court is that you, said Mary M. Rogers, on the first Friday of February, in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed yard of the State prison at Windsor, in the county of Windsor, be hung by the neck until dead. And it is ordered that a warrant be issued by the clerk of the County Court within and for said county of Bennington, under the seal of said court, to the said sheriff of said county of Windsor, commanding said sheriff to cause said sentence to be carried into effect. And it is also the sentence of this court that in the meantime you, said Mary M. Rogers, be confined in said State prison at hard labor therein until within three months of the said time fixed for said execution and for and during three months next prior to the time fixed for said execution, and up to said execution you, the said Mary M. Rogers, be confined in solitary confinement in the said State prison."

And whereas under and by virtue of the said judgment and sentence of the said court there was, by the clerk of the said court, and under the seal of the said court, on January 1, 1904, duly issued a mittimus directed

to the said sheriff of the said county of Bennington, therein reciting said judgment and sentence of said court, and commanding him, the said sheriff of said Bennington County, to take the body of the said Mary M. Rogers and her to commit to the said State prison at said Windsor, there to stand to and abide the judgment and sentence of said court as aforesaid. And whereas by virtue of said mittimus the sheriff of the county of Bennington did, on, to wit, January 2, 1904, take the body of the said Mary M. Rogers and her commit to the said State prison at the said Windsor.

30 And whereas on, to wit, the 2nd day of January, 1905, there was issued by the clerk of said County Court of said county of Bennington, and under the seal of said court, a warrant directed to the said sheriff of the said county of Windsor therein reciting the said judgment and sentence of said court as hereinabove set forth, and by the authority of the State of Vermont commanding the said sheriff that upon the first Friday of February next, in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of the said day, within the walls of enclosed yard of the said State prison of said Windsor, to cause execution of said sentence of the said honorable court in all respects to be done and performed upon the body of her, the said Mary M. Rogers, agreeably to the provisions of the law of Vermont:

Now, therefore, I, Charles J. Bell, governor of the State of Vermont, under and by virtue of the power and authority vested in me by the constitution of the State of Vermont, do hereby grant to and unto the said Mary M. Rogers a reprieve of and from the said sentence of death of said court as above set forth to and until Friday, the 2nd day of June, 1905, to and until between the hours of one and two o'clock in the afternoon of the said 2nd day of June, 1905, when and whereupon you shall in all respects execute and carry out the judgment and sentence of death of said court, as hereinabove set forth.

Given under my hand and the seal of the State of Vermont at Montpelier, this 2nd day of February, in the year of our Lord one thousand nine hundred and five and in the year of the Independence of the United States the one hundred and twenty-ninth.

[SEAL.] C. J. BELL, *Governor.*

By the governor:

CHARLES T. WALTER.

31 *Secretary of Civil and Military Affairs.*

The above is a true copy of the reprieve of Mary M. Rogers as delivered to Henry H. Peck, sheriff of Windsor County.

CHARLES T. WALTER,
Secretary of Civil and Military Affairs.

February 3, 1905.

(Endorsed:) Reprieve of Mary M. Rogers, February 2nd, 1905, to June 2, 1905.

To the sheriff of the county of Windsor and State of Vermont, greeting:

Whereas Mary M. Rogers, of Bennington, in the county of Bennington and State of Vermont, was, by the consideration and judgment of the

honorable County Court in and for the county of Bennington and State of Vermont, begun and held at said Bennington on the first Tuesday of December, 1903, duly convicted of the crime of murder of Marcus M. Rogers on the 12th day of August, 1903, and was in said court then and there sentenced by said court in session, in the following words, to wit:

"The sentence of the court is that you, said Mary M. Rogers, on the third day of February, in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed walls of the State prison at Windsor, in the county of Windsor, be hung by the neck until dead. And it is ordered that a warrant be issued by the clerk of the County Court within and for said county of Bennington, under the seal of said court, to the said sheriff of said county of Windsor, commanding said sheriff to cause said sentence to be carried into effect. And it is also the sentence of this court that in the meantime you, said Mary M. Rogers, be confined in said State prison at hard labor therein until within three months of the said time fixed for said execution, and for and during three months next prior to the time fixed for said execution, and
32 up to said execution you, the said Mary M. Rogers, be confined in solitary confiement in the said State prison."

And whereas under and by virtue of the said judgment and sentence of the said court, there was, by the clerk of the said court, and under the seal of said court, on January 1, 1904, duly issued a mittimus directed to the said sheriff of the said county of Bennington, therein reciting said judgment and sentence of said court, and commanding him, the said sheriff of said Bennington County, to take the body of the said Mary M. Rogers and her to commit to the said State prison at said Windsor, there to stand to and abide the judgment and sentence of said court as aforesaid. And whereas by virtue of said mittimus, the sheriff of the county of Bennington did, on, to wit, January 2, 1904, take the body of the said Mary M. Rogers and her commit to the said State prison at said Windsor.

And whereas on, to wit, the 2nd day of January, 1905, there was issued by the clerk of said County Court of said county of Bennington, and under the seal of said court, a warrant directed to the said sheriff of the said county of Windsor, therein reciting the said judgment and sentence of said court, as hereinabove set forth, and by the authority of the State of Vermont commanding the said sheriff that upon the first Friday of February then next in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of the said day, within the walls or enclosed yard of the said State prison at said Windsor, he cause execution of the sentence of the said honorable court in all respects to be done and performed upon the body of her, the said Mary M. Rogers, agreeably to the provisions of the law of Vermont. And whereas I, Charles J. Bell, governor of the State of Vermont, under and by virtue of the power and authority vested in me by the constitution of the State of Vermont, did, on the 2nd day of February, in the year of our Lord one thousand nine hundred and five, under my
33 hand and the seal of the State of Vermont, grant to and unto the said Mary M. Rogers a reprieve of and from the said sentence of death of said court, as above set forth, to and until Friday, the 2nd day of June, 1905, to and until between the hours of one and two in the

afternoon of the second day of June, 1905, with the order and direction therein that then and thereupon on said second day of June, 1905, you should in all respects execute and carry out the judgment and sentence of death of said court, as hereinabove set forth, and which reprieve did fully set forth the judgment and sentence of death of said court, all as hereinabove set forth.

Now, therefore, I, Charles J. Bell, governor of the State of Vermont, under and by virtue of the power and authority vested in me by the constitution of the State of Vermont, do hereby grant to and unto the said Mary M. Rogers, a reprieve to and from the said sentence of death of the said court, as above set forth, to and until the twenty-third day of June, 1905, to and until between the hours of one and two o'clock in the afternoon of the said Friday, the 23d day of June, 1905, when and whereupon you shall in all respects execute and carry out the judgment and sentence of death of said court, as hereinabove set forth.

Given under my hand and the seal of the State of Vermont, at Montpelier, this first day of June, in the year of our Lord one thousand nine hundred and five and in the year of the Independence of the United States the one hundred and twenty-ninth.

C. J. BELL, *Governor.*

By the governor:

CHARLES T. WALTER,
Secretary of Civil and Military Affairs.

I hereby certify that the foregoing is a full, true, and correct copy of the original reprieve granted by his excellency, Governor C. J. Bell, to Mary M. Rogers, under date of June 1st, 1905.

Attest:

CHARLES T. WALTER,
Secretary of Civil and Military Affairs.

34 And afterwards, and on the same 21st day of June, A. D. 1905, said cause came on for hearing before the Honorable Hoyt H. Wheeler, judge of the United States District Court within and for the District of Vermont.

And afterwards, and on the 22nd day of June, A. D. 1905, at 9.45 o'clock a. m., it was ordered that said petition be denied, and the petitioner was remanded to custody of the superintendent of the Vermont State prison.

And afterwards, and on the 22nd day of June, A. D. 1905, at 9.45 o'clock a. m., the petitioner entered a motion for appeal to the Supreme Court of the United States.

And afterwards, and on the same 22nd day of June, A. D. 1905, the relator filed her petition for appeal to the Supreme Court of the United States; which said petition is in the words and figures following:

35 District Court of the United States, District of Vermont.

MARY MABEL ROGERS
v.
HENRY H. PECK, WILSON S. LOVELL.

The above-named plaintiff in error, Mary Mabel Rogers, conceiving herself aggrieved by the order entered on the 22nd day of June, A. D. 1905, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States; and she prays that this her appeal may be allowed, and that a transcript of the record and proceedings and papers upon said order so made, together with the proceedings of the County Court within and for the county of Bennington, and the record of the proceedings in the Supreme Court of Vermont in the petition for a new trial, together with the transcript of the record of the trial in Bennington County Court, duly authenticated, may be sent to the Supreme Court of the United States.

MARY MABEL ROGERS,
By F. M. BUTLER,
T. W. MOLONEY, and
E. B. FLINN,
Att'ys for Plaintiff and Appellant.

STATE OF VERMONT, *June , 1905.*

And now, to wit, on this 22 day of June, A. D. 1905, it is ordered that the foregoing appeal be allowed as prayed for, and that the relator be remanded to the custody from which she was taken for safe keeping pending the appeal, and citation issued.

HOYT H. WHEELER, *Judge.*

(Endorsed:) Filed June 22nd, 1905. Geo. E. Johnson, clerk.

36 And afterwards, and on the same 22nd day of June, A. D. 1905, at 5.30 p. m., it was ordered by the court that the foregoing appeal be allowed as prayed for, and that the relator be remanded to the custody from which she was taken for safe keeping, pending the appeal, and citation issued.

And afterwards, and on the 3rd day of July, A. D. 1905, the court handed down its opinion in said cause, which said opinion is in the words and figures following:

37 District Court of the United States, District of Vermont.

In re Mary Mabel Rogers, on habeas corpus.

WHEELER, J.

By section 4886 of the Vermont statutes, the punishment of murder in the first degree is death. By section 4007, the court at the time of sentencing to death, if it is six months before execution, is to sentence to hard labor in the State prison until three months before execution, and to solitary confinement from the time of hard labor to the time of execu-

tion. The prisoner may bring a petition for a new trial to the Supreme Court, and by sections 1997 and 1998 two judges may allow it to be filed, and if they do so they are to allow a stay; and by section 1999, if on hearing the petition is refused, the court is to appoint a time for execution. In cases of treason or murder, by the constitution, section 11, the governor may grant a reprieve, but not pardon, until after the next session of the assembly.

The petitioner here was sentenced by Bennington County Court in December, 1903, to hard labor until three months before February 3, 1905, and to solitary confinement during that three months and then to be executed. Before that day she was reprieved by the governor to June 2, 1905. A petition for a new trial was allowed to be filed by two judges, with a memorandum that the reprieve was a sufficient stay. The petition was refused by the court before June 2nd, without appointing
38 any time for the execution of the sentence, but leaving the time to which she was reprieved to stand. She was further reprieved from June 2nd to June 23rd, leaving the sentence of execution to be carried into effect then.

She appears to have been kept in the same solitary confinement since February 3rd that she was during the three months before February 3rd, until she was produced on this writ, without further sentence than that of Bennington County Court.

In Medley's case, 134 U. S., 160, solitary confinement with the sentence of death appears to have been considered and held to be of itself a separate and severe punishment in addition to being in custody until execution by hanging; and he appears to have been discharged from that confiement because the State of Colorado had, by statute going into effect after the commission of the crime, provided for the punishment of solitary confinement for a time before the execution.

In this case the statutes require the keeper of the prison, having custody, to inflict solitary confinement until February 3rd, as it was imposed by sentence of Bennington County Court. The prisoner was left to suffer that punishment after February 3rd by the reprieve of the governor and has been suffering it every since. The governor could only reprieve to a certain time, and the Supreme Court could only appoint a new time for execution. Neither could resentence, and she has been suffering the punishment of solitary confinement since February 3rd, without sentence, and has been brought from such confinement on this writ. The 14th amendment to the Constitution of the United States provides that no State shall deprive any person of life, liberty, or property without due process of law.

The petitioner apparently has been kept in solitary confine-
39 ment, not imposed as a sentence by any court anywhere, but because the statute, section 2007, left that to be done, and by that law the State of Vermont required the prison officials to inflict that punishment in addition to that of hanging. It was not the governor, nor the Supreme Court of the State. So this appears to be a deprivation of liberty of the State, to the extent of this solitary confinement.

This situation led to the granting of this writ. The question now is whether it is sufficient to require holding the petitioner out of the custody of the State prison officials and discharging her, because she has been

unlawfully made to suffer that punishment until now and if remanded to the full custody of the prison officials would have to suffer it till the time of execution. Due process of law would seem to require that the person be present and have an opportunity to be heard at the time of the sentence. No court anywhere would probably sentence to such severe punishment as solitary confinement without the presence of the prisoner. She had not been present at any sentence to that infliction, and therefore appears to have been deprived of the right to be free from it by the State without the due process of law guaranteed by the Federal Constitution. It follows that she should be discharged from that solitary confinement if it can and should now be done. This court has no authority, in any *any* manner, to interfere with the State proceedings except to prevent any of the privileges or immunities of the person, under the Constitution of the United States, from being taken away or abridged. She has all the while had the right to apply to the State courts for relief from this solitary confinement by habeas corpus proceedings like these. According to Storti *vs.* Massachusetts, 183 U. S., 138, and other cases as understood, these matters should, to the extent of denial or failure, be followed out in the State courts.

A discharge from the solitary confinement on this writ now would be so near the time of execution under the expiration of the reprieve as to be practically inoperative while it could have been applied for sooner in the State courts or here; and on the whole these are so far matters of State procedure that it seems that the petitioner should be remanded. It appears that an application for a writ of error to the State Supreme Court has been before Mr. Justice Peckham, and his decision thereon has been referred to. If the questions here had been involved there before him, of course they would not have been examined here, but it is understood that they were not. An application for a writ of error to review the proceedings of the Supreme Court on the petition for a new trial would not seem to involve any question as to the custody of the petitioner pending that petition, or after a reprieve. The facts stated as to the petition for a new trial, the memorandum of the two judged thereon, its disposition and the omission therefrom of any appointment thereon by the Supreme Court of a time of execution, are found from concessions made by the attorney-general of the State and counsel for the petitioner in her presence at the hearing; and the fact of solitary confinement since February 3rd the same as before as stated is inferred from the returns, and like concessions, of the prison officials.

Petitioner remanded.

After the petitioner was remanded an appeal to the Supreme Court of the United States was applied for and opposed by the State. In Storti vs. Massachusetts an appeal was denied promptly by the judges of the Circuit Court to give "counsel an opportunity to seasonably reach the Supreme Court, or some justice thereof." An appeal appears to have been allowed afterwards by Mr. Justice Gray. In re Storti, 109 Fed., 807. Here there was no sufficient time, only about one day before execution, in which to reach a justice of the Supreme Court, and no one else could allow an appeal if it should be denied here. What seems to be more of a Federal question than any involved or determined there arises here,

and to deny an appeal, which is largely a matter of right, would
41 arbitrarily cut off all chance to have it reviewed. After the petitioner was remanded to the custody of the State authorities, and an appeal had been applied for, but before it was allowed, the governor appears to have granted a further reprieve till the 8th of December, after the sitting of the Supreme Court at which the appeal may be determined.

Fred M. Butler, Thomas C. Moloney, Edward B. Flinn, for petitioner.
Clarke C. Fitts, attorney-general for the State.
(Endorsed:) Filed July 3rd, 1905. Geo. E. Johnson, clerk.

And afterwards, and on the 10th day of July, A. D. 1905, the citation issued in said cause was returned into court with service accepted in writing thereon; which said citation is hereto attached.

And afterwards, and on the 21st day of July, A. D. 1905, a transcript of record from Bennington County Court was duly filed in said cause; which said transcript of record is in the words and figures following:

42 STATE OF VERMONT,
County of Bennington:

Pleas before the honorable the Supreme Court for the State of Vermont, begun and held for the county of Bennington at Montpelier, in the county of Washington, on the second Tuesday of May, Anno Domini one thousand nine hundred and five, being the ninth day of said month, and it being a general term of said court.

Present, the Honorable John W. Rowell, chief judge; the Honorable James M. Tyler, the Honorable Loveland Munson, the Honorable Henry R. Start, the Honorable John H. Watson, the Honorable Seneca Haselton, the Honorable George M. Powers, associate judges. Melville E. Smilie, clerk. Harry T. Cushman, clerk for Bennington County.

On which day said court was opened and continued its sessions from day to day for the disposition of causes until the thirty-first day of May, A. D. 1905, when the same was adjourned without day.

Attest: HARRY T. CUSHMAN, *Clerk.*

43 MARY M. ROGERS
v.
STATE OF VERMONT.

Be it remembered that on the fifth day of May, in the year of our Lord one thousand nine hundred and five, before the honorable John W. Rowell and the honorable Loveland Munson, two judges of the Supreme Court for the State of Vermont, comes Mary M. Rogers, of Bennington, in our said county of Bennington, by Thomas W. Moloney, esquire, her attorney, and John H. Senter, esquire, counsel, after conviction of the said Mary M. Rogers of a capital offense and while the said Mary M. Rogers, upon said conviction, is sentenced to be hanged therefor, and presents to said two judges her certain petition in writing, signed with

the hand of the said Mary M. Rogers, and in the words and figures following, namely:

IN RE MARY M. ROGERS' PETITION FOR NEW TRIAL. } Supreme Court.

To the honorable Supreme Court of Vermont:

Your petitioner would respectfully represent that she is at present confined within the State's prison at Windsor, in the county of Windsor, by the consideration and judgment of the honorable County Court in and for the county of Bennington and State of Vermont, begun and held at said Bennington on the first Tuesday of December, 1903, having then and there been wrongfully convicted, as she says, of murder in the first degree, to wit, the murder of Marcus M. Rogers on the 12th
44 day of August, 1902, and was in court then and there sentenced by said court in session in the following words, to wit:

"The sentence of the court is that you, the said Mary M. Rogers, on the first Friday in February, in the year of our Lord one thousand nine hundred and five, between the hours of one and two o'clock in the afternoon of said day, within the walls or enclosed yard of the State prison at Windsor, in the county of Windsor, be hanged by the neck until dead;" and whereas the honorable Charles J. Bell, on the second day of February, A. D. 1905, at Montpelier, in the State of Vermont, then and there being the governor of Vermont, and by virtue of his power as such under the constitution, did grant to and unto your petitioner a reprieve of and from the said sentence of death to and until Friday, the second day of June, 1905. Now, therefore, your petitioner hereby presents this her petition to this honorable court, humbly praying that a new trial be granted unto her on the ground of newly discovered evidence and for errors apparent on the face of the record, a copy of which and said newly discovered evidence is hereto attached.

Dated at Windsor, in the county of Windsor, this twenty-first day of April, A. D. 1905.

(Signed) MARY M. ROGERS.

As by the original petition of said prisoner, now remaining among the records and files of this court, will fully and at length appear.

Whereupon, upon examination of said petition and due consideration of the matters and things alleged therein and thereby, the said two judges of the Supreme Court for the State of Vermont do determine that the same may be filed in this court, and furthermore do appoint a time and place when and where this court will hear the same, and do certify their determination thereon by their order in writing, under the official hands of the said two judges of said Supreme Court, and endorsed
45 upon said original petition, and which is in the words and figures following, namely:

Order for filing.

This petition having been presented to us, upon examination thereof, we determined that it may be filed in the Supreme Court, and appoint the second Wednesday of the next May term thereof, at nine o'clock in

the forenoon, for hearing the same. We make no order for staying execution, as a reprieve has been granted until the second day of June, next. The transcript of the evidence taken at the trial is, by agreement of counsel, treated as a copy hereto attached.

Done at Montpelier this fifth day of May, A. D. 1905.

(Signed) JOHN W. POWELL,
(Signed) LOVELAND MUNSON,
Judges of the Supreme Court.

As by said original order of said two judges, now remaining among the records and files of this court, will fully and at length appear.

Whereupon, and pursuant to said order and determination on the sixth day of May, one thousand nine hundred and five, the said Mary M. Rogers caused her said petition, together with the certificate and order of the two judges aforesaid endorsed thereon, to be duly filed for adjudication and determination in this court.

And now, in the present May term of this court, in the year of our Lord first aforesaid, namely, on the second Wednesday of said term, hither cometh the said Mary M. Rogers, by her attorneys aforesaid, to urge her said petition, and Clarke C. Fitts, the attorney-general of the State of Vermont, and with him, William P. Daley, the State's attorney for said county of Bennington, come also to defend the same.

Whereupon, the said petition being considered and the pro-
46 ceedings thereunder, as well as the arguments of the attorneys, and the premises being examined and fully understood and due deliberation being thereupon had, it is considered and adjudged by the court still here in session that the said prisoner, Mary M. Rogers, take nothing by her said petition, and that the same be dismissed, which is thereupon done.

A true record. Attest:

HARRY T. CUSHMAN, *Clerk.*

STATE OF VERMONT, *Bennington, to wit:*

I, Harry T. Cushman, clerk of the Supreme Court for the State of Vermont, for the county of Bennington, hereby certify the papers hereunto attached to show a true copy of the original record of an action upon petition heard, tried, and determined by and before said honorable court at the May term, 1905, thereof, and entitled upon the docket of said court for said term Mary M. Rogers v. State of Vermont, all as the same appears among the records and files of said Supreme Court for said term, now remaining in my office at Bennington, in the county of Bennington aforesaid.

In testimony whereof I have hereunto set my hand and affixed the seal of said honorable Supreme Court at Bennington, in the county of Bennington, this 19th day of July, 1905.

[L. S.] HARRY T. CUCHMAN, *Clerk.*

(Endorsed:) Filed July 21st, A. D. 1905. Geo. E. Johnson, clerk.

47 And afterwards and on the 28th day of July, A. D. 1905, certified copies from the Supreme Court for the State of Vermont, for the county of Bennington, of the affidavits of Wilson S. Lovell,

E. W. Oakes, Edward B. Flinn, Mary A. Hayes, Charles W. Corcoran, Helen F. Corcoran, William Stinton, Barney Smith, Teresa Smith, Louis Haussler, Jane Smith, William Brant, Leroy D. McWayne, Charles McCarthy, William P. Haynes, George M. Lamb, Johanna Callahan, James C. Reilly, E. G. Hall, F. C. Archibald, and Daniel A. Guiltinan, of the record of the proceedings in the matter of Patrick Dwyer, and of the certificate of Charles W. Pilgrim, M. D., and of Shepard Tappen, clerk of the county of Rensselaer, and of the certificate and record of marriage of Marcus Merritt Rogers and Mary Mabel Bennett, being attached to the petition for a new trial of the said Mary M. Rogers, filed in said Supreme Court on the 6th day of May, 1905, were duly filed in this cause, which said affidavits are in the words and figures following:

48 IN RE MARY M. ROGERS, PETITION FOR A NEW TRIAL. } Supreme Court, May term, 1905.

I, Wilson S. Lovell, of Windsor, in the county of Windsor and State of Vermont, on oath depose, testify, and say that I was present at an interview had by E. B. Flinn with one Leon Perham, who, I am informed, was improved as a witness by the State in the trial of Mary M. Rogers, in the Bennington County Court, and that said Perham stated to said Flinn and to me and to E. W. Oakes, or in his presence, that he, the said Perham, lied when he testified on said trial, and did it to save his own neck. The date of this interview was Jan. 31, 1905, and took place in the State prison office at Windsor.

WILSON S. LOVELL.

Subscribed and sworn to at Windsor, in said county, this twenty-first day of February, A. D. 1905.
Before me.

EDWARD B. FLINN,
Master in Chancery.

49 IN RE MARY M. ROGERS, PETITION FOR A NEW TRIAL. } Supreme Court, May term, 1905.

I, E. W. Oakes, of Windsor, Vermont, on oath depose, testify, and say that on or about Jan. 31st, 1905, I heard Leon Perham tell E. B. Flinn that he, the said Perham, when he testified against Mary M. Rogers, in the County Court in Bennington, lied, and had to do it in order to save himself.

E. W. OAKES.

Subscribed and sworn to at Windsor, in the county of Windsor, this twenty-first day of April, A. D. 1905.
Before me.

EDWARD B. FLINN,
Master in Chancery.

50 IN RE MARY M. ROGERS, PETITION FOR NEW TRIAL. } Supreme Court, May term, 1905.

I, Edward B. Flinn, of Springfied, in the county of Windsor, on oath depose, testify, and say that on the thirty-first day of January, A. D.

1905, Leon Perham, in speaking of the testimony given by him on the trial of Mary M. Rogers, said that he lied when he testified, and had to in order save to his own neck.

EDWARD B. FLINN.

Subscribed and sworn to at Windsor, in said Windsor County, this 20th day of April, A. D. 1905.
Before me.

GILBERT F. DAVIS,
Notary Public.

51 STATE OF NEW YORK,
Rensselaer County, ss.

Miss MARY A. HAYES, being duly sworn, deposes and says:
That she is a resident of the village of Hoosick Falls, county of Rensselaer and State of New York.

Deponent further says that during the years 1893 and 1894 this deponent well knew Mary Mabel Rogers, who is now confined in the Windsor prison, in the State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers, in the town of Bennington, State of Vermont.

That this deponent during the year above mentioned attended school in said village of Hoosick Falls together and at the same time with said Mary Mabel Rogers; and this deponent remembers distinctly that the said Mary Mabel Rogers was the butt of ridicule of nearly all the students attending the school in said village of Hoosick Falls at that time, on account of the many peculiarities which she, the said Mary Mabel Rogers, possessed, one particular peculiarity being the decorating of her hair and clothing with ribbons and bows of many and variegated colors, on account of which she presented a fantastic appearance, which drew upon her the ridicule of her schoolmates, and the sobriquet of the mope from them of which she was generally known by all her schoolmates.

Deponent further says that the said Mary Mabel Rogers was very backward in her studies; that she was of very low intelligence, and was considered by this deponent, her teachers, her schoolmates, and other people, with whom the said Mary Mabel Rogers came in contact, as a person very weak mentally.

MARY A. HAYES.

52 Sworn to before me this 6th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

STATE OF NEW YORK,
Rensselaer County, ss:

CHARLES W. CORCORAN, being duly sworn, deposes and says:
That he is a resident of the village of Hoosick Falls, county and State aforesaid.

That Mary Mabel Rogers, who this deponent is informed and believes is confined in Windsor prison, State of Vermont, for the murder of her husband, Marcus Rogers, worked for the mother of this deponent as a domestic for several months during the year 1897.

That for several years prior to the time the said Mary Mabel Rogers worked for his said mother, as aforesaid, this deponent knew the said Mary

Mabel Rogers, having frequently met her while in attendance at school in Hoosick Falls, and that then the said Mary Mabel Rogers was the subject of much ridicule from her schoolmates because of her foolish actions, because she appeared to this deponent and others as a child with a weak mind.

Deponent further says that while the said Mary Mabel Rogers worked for his mother as aforesaid, this deponent had many opportunities to observe the said Mary Mabel Rogers, her conduct, and actions; and this deponent knew the said Mary Mabel Rogers to be an impulsive, emotional person of very nervous disposition and excitable temperament—a person of very low intelligence and mentally weak.

CHAS. W. CORCORAN.

Sworn to before me this 6th day of April, 1905.

CHAS. A. McCARTHY,
Notary Public, Rens. Co., N. Y.

53 STATE OF NEW YORK,
Rensselaer County, ss:

Miss HELEN F. CORCORAN, being duly sworn, deposes and says:

That she is a resident of and a merchant doing business in the village of Hoosick Falls, county of Rensselaer, and State of New York.

Deponent further says that during the years 1894 and 1895 this deponent well knew Mary Mabel Rogers, who is now confined in the Windsor prison, in the State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers, of the town of Bennington, Vermont.

That this deponent, during the year above mentioned, attended school in the village of Hoosick Falls aforesaid together and at the same time with the said Mary Mabel Rogers. This deponent remembers distinctly that the said Mary Mabel Rogers was the butt of ridicule for many of the students on account of the many peculiarities which she, the said Mary Mabel Rogers, possessed, one peculiarity being the decorating of her hair and clothing with ribbons and bows of various hues and colors, creating thereby a fantastic appearance, which drew upon her the ridicule of her schoolmates, and in which she apparently took much pride.

Deponent further says that the said Mary Mabel Rogers was backward in her studies; that she was of very low intelligence, and was known to this deponent and to other people with whom the said Mary Mabel Rogers came in contact as a person very weak intellectually.

HELEN F. CORCORAN.

Sworn to before me this 5th day of April, 1905.

CHAS. A. McCARTHY,
54 *Notary Public, Rens. Co., N. Y.*

STATE OF VERMONT,
Rensselaer County:

WILLIAM STINTON, being duly sworn, deposes and says:

That he is a resident and merchant doing business in the village of Hoosick Falls, in the county of Rensselaer and State of New York.

That Mary Mabel Rogers, who is now confined in Windsor prison, in the State of Vermont, now under sentence of death for the murder of her husband, Marcus Rogers, of the town of Bennington, Vermont, worked for this deponent for several months during the year 1897.

That said Mary Mabel Rogers worked for this deponent during said time as a domestic, and this deponent, by reason of said Mary Mabel Rogers being employed by him as aforesaid, had much opportunity to study the peculiarities and characteristics of the said Mary Mabel Rogers.

That while the outward appearance of said Mary Mabel Rogers was that on an ordinary intelligent person, this deponent well knew the said Mary Mabel Rogers to be a person of very low intelligence, possessed with a very nervous disposition, excitable temperament, and a person very weak mentally.

WILLIAM STINTON.

Sworn to before me this 5th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

55 STATE OF NEW YORK,
Rensselaer County, ss:

BARNEY SMITH, being duly sworn, deposes and says:

That he is a resident of the town of Hoosick, county of Rensselaer, and State of New York.

That for many years this deponent resided in the village of Hoosick, in the county of Rensselaer, as a neighbor of Patrick Dwyer, a brother of Johanna Callahan, who is the mother of Mary Mabel Rogers, who is now confined in the Windsor prison, in the State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers.

Deponent further says that on or about the 17th day of March, 1886, near the village of Hoosick Falls, New York, the said Patrick Dwyer, while he (the said Patrick Dwyer), as this deponent is informed and believes, was temporarily insane, attempted suicide by cutting his throat. That this deponent assisted in watching and attending said Patrick Dwyer at his home after said attempt on his life.

Deponent further says that thereafter and on or about the 20th day of April, 1886, the said Patrick Dwyer, uncle of said Mary Mabel Rogers and brother of the mother of said Mary Mabel Rogers, was examined by Dr. J. C. Hannon, of Hoosick Falls, New York, and Dr. John H. Cipperly, of Troy, New York, and the said Patrick Dwyer was by each of the physicians declared to be an insane person, and by said examination, certified by said physicians above mentioned, the said Patrick Dwyer was, by an order made on the 20th day of April, 1886, by Edgar L. Fursman, Rensselaer County judge, committed to the Hudson River State Hospital, at Poughkeepsie, New York, as an insane person.

BARNEY SMITH.

56 Sworn to before me this 7th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

STATE OF NEW YORK,
Rensselaer County, ss:

TERESA SMITH, being duly sworn, deposes and says:

That she is a resident of the town of Hoosick, in the county of Rensselaer and State of New York.

That she has resided in the village of Hoosick, in the town of Hoosick, county of Rensselaer and State of New York, near the home of Mary Mabel Rogers, who, as this deponent is informed and believes, is now confined in Windsor prison, State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers, and that this deponent has been intimately acquainted with the said Mary Mabel Rogers since her early childhood.

Deponent further says that she has frequently noticed that the said Mary Mabel Rogers acted strangely, and this deponent does not believe that the said Mary Mabel Rogers was at all times sound mentally.

Deponent further says that the said Mary Mabel Rogers was a person of low intelligence and was known to this deponent as a person at all times weak mentally.

TERESA SMITH.

Sworn to before me this 7th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

57 STATE OF NEW YORK,
Rensselaer County, ss:

LOUIS HAUSSLER, being duly sworn, deposes and says:

That he is a resident of the village of Hoosick Falls, county of Rensselaer and State of New York.

That he is engaged in the business of undertaker and funeral director in said village. That on or about the 13th day of August, 1902, he was employed by William Rogers to prepare for burial the body of his brother Marcus Rogers, who was alleged to have been murdered in the village of Bennington, Vermont, on or about August 12, 1902.

Deponent further says that while he was engaged in preparing the body of Marcus Rogers aforesaid for burial, at the residence of the said William Rogers in the town of Hoosick, New York, this deponent discovered a compound multiple depressed fracture of the skull on the back upper side of the skull, just over the ear.

Deponent further says that said fracture was not made after the body came into his charge for burial.

LOUIS HAUSSLER.

Sworn to before me this 6th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

58 STATE OF NEW YORK,
Rensselaer County.

JANE SMITH, being duly sworn, deposes and says:

That she is a resident of the town of Petersburg, county of Rensselaer and State of New York.

That for many years this deponent resided in the town of Hoosick, in said county of Rensselaer and State of New York, as a neighbor of Charles Bennett, father of Mary Mabel Rogers, who deponent is informed and believes is now confined in Windsor prison in the State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers.

That at the time of the birth of the said Mary Mabel Rogers this deponent was in attendance upon her mother, Johanna Bennett, and assisted in nursing her during her confinement and helped care for the said mother for some time after the birth of said child.

Deponent further says, that during the time she was in attendance upon the said Johanna Bennett, that Charles Bennett, the husband of Johanna Bennett and the father of said Mary Mabel Rogers, acted strangely and violently at times, and apparently had an insane desire to do injury to his wife while she was in bed. That the said Charles Bennett frequently exclaimed in a loud manner and while in a violent temper, that he would kill the mother, and that if a child were born to him he would kill the same, and that during all this time his wife was in great fear that her husband would do her great bodily injury.

Deponent further says, that a few days after the birth of said Mary Mabel Rogers, this deponent while assisting in performing the housework heard the mother of Mary Mabel Rogers calling for aid,
59 saying that the father was trying to kill the child. This deponent then hastened into the bedroom in which the mother and child lay in bed and there found Charles Bennett, the father, trying to kill the child by smothering it with the bed clothes, which he was holding tightly over the face of the infant child; that this deponent and others who aided her forced Charles Bennett from the room.

Deponent further says that for several years before and after the birth of said Mary Mabel Rogers she frequently met and well knew the said Charles Bennett; that the said Charles Bennett was addicted to the use of alcoholic liquors; that he was of a low, depraved mentality and was weak intellectually was well known to this deponent.

Deponent further says that the said Charles Bennett frequently and at the slightest provocation flew into a violent passion, and at such times acted in an insane manner toward his wife and friends.

Deponent further says that said Charles Bennett was a degenerate; that his actions were those of a person of unsound mind, and this deponent firmly believes that the said Charles Bennett was a victim of moral insanity.

JANE SMITH.

Sworn to before me this 7th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

60 STATE OF NEW YORK,
Rensselaer County, ss:

WILLIAM BRANT, being duly sworn, deposes and says:

That he is a resident of the village of Hoosick, in the town of Hoosick, county of Rensselaer and State of New York, and has been a resident of said village for upwards of forty years.

That this deponent has known said Mary Mabel Rogers, confined in Windsor prison, State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers, since her birth; and that this deponent well knew Charles Bennett, the father, and Johanna Bennett, the mother of said Mary Mabel Rogers. That the mother of said Mary Mabel Rogers is a woman of very low intelligence and mentally weak. That the father

of said Mary Mabel Rogers was addicted to the excessive use of alcoholic liquors, and while in a intoxicated condition and frequently at other times acted in a violent and abusive manner toward his family, and treated them most inhumanely. That said Charles Bennett possessed a low, depraved nature, was mentally weak, and was a moral degenerate.

That this deponent is informed and believes that the said Charles Bennett on several occasions after the birth of his child attempted to take the life of his infant child, the said Mary Mabel Rogers.

Deponent further says that the actions of said Charles Bennett were those of a person of unsound mind, and this deponent believes the said Charles Bennett was a person morally insane.

Deponent further says that he knew the said Mary Mabel Rogers from infancy until she grew to womanhood, and that he frequently
61 observed that she had many of the characteristics possess' by her father and mother. That she was as a child possessed at times of an ungovernable temper, impulsive, and apparently incapable of acting and behaving like other people; was of a very low intelligence and of a nervous disposition, excitable temperment, and a person very weak mentally, and was so generally considered by people who knew her.

WILLIAM BRANT.

Sworn to before me this 7th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

STATE OF NEW YORK,
Rensselaer County, ss:

LEROY D. MCWAYNE being duly sworn, deposes and says:

That he is a resident of the village of Hoosick Falls, Rensselaer County, New York.

That he has been a practicing physician for thirty years, and for twenty years last past has been in the practice of medicine in the village of Hoosick Falls, aforesaid.

That he was acquainted with the said Mary Mabel Rogers, who is now confined in Windsor prison, in the State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers, having on many occasions for several years treated and prescribed medicine for her professionally previous to August 12, 1902, the day this deponent is informed said Marcus Rogers met his death.

Deponent further says that he well knew the said Marcus Rogers, husband of the said Mary Mabel Rogers.

Deponent further says that on or about August 7th, 1902, the said Marcus Rogers, husband of the said Mary Mabel Rogers, called at the office of this deponent in the village of Hoosick Falls, aforesaid,
62 and asked this deponent if Mary Mabel Rogers, his wife, has been calling upon him to consult him professionally. Upon this deponent answering him affirmatively, the said Marcus Rogers then informed this deponent that he expected his wife would soon call upon this deponent again, and, he then requested this deponent not to treat his wife, nor to give to her any medicine or any other drug she might call for. He, the said Marcus Rogers, then said to this deponent, the reason he made this request was that his wife, Mary Mabel Rogers, had of late

been acting strangely, and that he did not believe that she was of sound mind; that he feared that if she obtained any dangerous medicine or drugs she might do herself or some one else bodily injury.

Deponent further says that on Sunday, August 10th, 1902, a few days after the said Marcus Rogers had called at his office, the said Mary Mabel Rogers called at the office of this deponent and demanded that this deponent should prescribe for her certain drugs and medicines which this deponent knew to be dangerous. This deponent then observed that the said Mary Mabel Rogers was in a highly nervous mental state of mind and refused to prescribe for her or furnish to her the drugs and medicines desired.

Whereupon the said Mary Mabel Rogers flew into a violent passion, soundly berated this deponent for refusing her request, and threatened to kill this deponent if he did not prescribe for her as requested by her. This deponent then tried to reason with and calm her, and after calling for assistance and using much persuasion induced her to leave his private office and go in to his reception room, where this deponent had a long conversation with the said Mary Mabel Rogers, and where this deponent, in the presence of this deponent's wife, examined the said Mary Mabel Rogers as to her sanity and mental state. That after a careful
63 examination of the said Mary Mabel Rogers then and there had this deponent determined that the said Mary Mabel Rogers was then suffering with puerperal insanity.

This deponent further says that on said Sunday, August 10th, 1902, at the time said Mary Mabel Rogers called at this deponent's office, the said Mary Mabel Rogers was temporarily insane, caused, as this deponent believes, by pregnancy, in which condition she was at the time.

LEROY D. MCWAYNE, M. D.

Sworn to before me this 5th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

CHARLES W. PILGRIM, M. D.,
Poughkeepsie, N. Y., January 23, 1905.

To whom it may concern:

This is to certify that Patrick Dwyer was admitted to this institution from Hoosick, N. Y., on April 20, 1886, suffering from a form of insanity known as acute melancholia with suicidal tendencies; that he was discharged as improved on August 4, 1886.

Respectfully,

CHAS. W. PILGRIM,
Superintendent.

STATE OF NEW YORK,
County of Rensselaer, ss.

Physician's certificate of insanity under oath.

In the matter of the application of Patrick Dwyer, an alleged indigent lunatic.

I, John H. Cipperly, a permanent resident of Troy, N. Y., in the
64 county and State aforesaid, being a graduate of the University of the City of New York, an incorporated medical college, and having

practiced as a physician three years, do hereby certify, under oath, that on the twentieth (20th) day of April, 1886, I personally examined at Troy, N. Y., in said county, Patrick Dwyer, of the age of about 33 years, married, alleged to be insane, and by occupation a laborer, and I certify after such personal examination, that the said Patrick Dwyer is insane and a proper person for care and treatment under the provisions of chapter 446 of the laws of 1874.

I further certify that I have formed this opinion upon the following grounds, viz: He says his life is not worth living; that himself and family would be better off if he were out of the world. In view of this he has already attempted suicide by cutting his throat, has threatened the lives of his children, takes no interest in his surroundings, and remains inactive nearly all the time.

And I further declare that my qualifications as a medical examiner in lunacy have been duly attested and certified by Hon. E. L. Fursman, county judge of Rensselaer County.

(Signed) JOHN H. CIPPERLY, M. D.

Subscribed and sworn to before me this 20th day of April, 1886.

(Signed) WM. NORTH,
Notary Public, Rensselaer Co., N. Y.

I hereby certify that this is a correct copy of the original.

CHAS. W. PILGRIM,
Supt. H. T. S. Hospital.

Judge's certificate of qualification of physician and approval of his certificate.

STATE OF NEW YORK,
County of Rensselaer ss:

65 I hereby certify that Dr. John H. Cipperly, of Troy, N. Y., is known to me to be a reputable physician and possessed of the qualifications required by chapter 446 of the laws of 1874 to authorize him to give a legal certificate of insanity, and that I approve the aforesaid certificate made by him.

(Signed) E. L. FURSMAN,
County Judge of Rensselaer County.

STATE OF NEW YORK,
County of Rensselaer, ss:

Physician's certificate of insanity under oath.

In the matter of the application of Patrick Dwyer, an alleged indigent lunatic.

I, J. C. Harmon, a permanent resident of the town of Hoosick, in the county and State aforesaid, being a graduate of Medical University of New York, an incorporated medical college, and having practiced as a physician three years, do hereby certify, under oath, that on the twentieth (20th) day of April, 1886, I personally examined at Hoosick Falls, in said county, Patrick Dwyer, of the age of about 33 years, married, alleged to be insane, and by occupation a laborer; and I certify after such per-

sonal examination that the said Patrick Dwyer is insane and a proper person for care and treatment under the provisions of chapter 446 of the laws of 1874.

I further certify that I have formed this opinion upon the following grounds, viz: Attempted suicide by cutting his throat; illusions, despondency, threatening himself or somebody else; aversion to his children, etc.

He is moreover under the impression that he has lost his manhood
66 and wants agents to reestablish his capacity for sustaining his marital relations, etc., etc.

And I further declare that my qualifications as a medical examiner in lunacy have been duly attested and certified by Hon. E. L. Fursman, county judge of Rensselaer County.

(Signed) J. C. HARMON, M. D.

Subscribed and sworn to before me this 20th day of April, 1886.

(Signed) WM. NORTH,
Notary Public, Rensselaer Co. N. Y.

I hereby certify that this is a correct copy of the original.

CHAS. W. PILGRIM,
Supt. H. T. S. Hospital.

Judge's certificate of qualification of physician and approval of his certificate.

STATE OF NEW YORK,
County of Rensselaer, ss:

I hereby certify that J. C. Harmon, M. D., of Hoosick, is known to me to be a reputable physician, and possessed of the qualifications required by chapter 446 of the laws of 1874, to authorize him to give a legal certificate of insanity, and that I approve the aforesaid certificate made by him.

(Signed) E. L. FURSMAN,
County Judge of Rensselaer County.

67 STATE OF NEW YORK,
County of Rensselaer.

I hereby certify that this is a correct copy of the original.

CHAS. W. PILGRIM,
Supt. H. R. S. Hospital.

In the matter of the application of Patrick Dwyer, an alleged indigent lunatic.

Application having been made to me by T. J. Hurley, of the city of Troy, in the county of Rensselaer, for an examination into the mental state, condition, and indegence of Patrick Dwyer, of the town of Hoosick, in the county of Rensselaer, under the existing laws of the State of New York, in reference to lunatics and lunatic asylums, and having fully investigated the facts of the case, both in regard to the mental condition and pecuniary circumstances of the said Patrick Dwyer. And it satisfactorily appearing to me from such investigation, and the certificates of

two physicians under chapter 546, laws 1874, that said Patrick Dwyer is insane, and that he became so within one year prior to the date hereof, and that he is in indigent circumstances, but is not a pauper, and that he has no estate, either in possession or held in trust for him by any person, nor has he any property sufficient for the support of himself or his family, under the visitation of insanity aforesaid. And due and reasonable notice thereof, and of the time and place of hearing the same, to the acting superintendent of the poor of the county aforesaid, having been given, and due proof having been made thereof to me, I do therefore hereby order, adjudge and determine accordingly, and send, authorize and direct the admission of the said lunatic in and to the Hudson River State Hospital, at Poughkeepsie, N. Y., under and in pursuance of the laws of the State of New York.

68 In testimony whereof I have subscribed my name to this order and certificate, at the city of Troy, the 20th day of April, 1886.

(Signed) EDGAR L. FURSMAN,
County Judge of Rensselaer County.

STATE OF NEW YORK,
County of Rensselaer, Clerk's Office:

I, the undersigned, clerk of Rensselaer County, hereby certify that I have compared the annexed copy, order, and certificate with the original thereof filed in this office on the twenty-first day of April, 1886, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have set my hand and affixed the seal of said county this 21st day of April, 1886.

(Signed) SHEPARD TAPPEN,
Clerk of Rensselaer County.

Affidavit of Charles McCarthy.

I, Charles A. McCarthy, of Hoosick Falls, Rensselaer County, New York, on oath depose and say that I am an attorney at law in practice at Hoosick Falls, and have lived in said town and county about twenty years last past. In January, 1905, I, in company with others, undertook to assist in the work of procuring a new trial for Mabel Mary Rogers, now confined in the State prison at Windsor, Vermont, under sentence of death. I did so from motives of humanity and because I had long been acquainted with the said Mrs. Rogers and her family, and from my knowledge and acquaintance believe she was not responsible mentally; and I did not undertake the work with the expectation of pay for my services.

69

Soon after the reprieve was granted to Mrs. Rogers by Gov. Bell, I undertook the looking up of evidence with a view to procuring affidavits to be attached to a petition for a new trial. In this work I was necessarily, and without my fault, greatly delayed by the severity of the weather and the bad condition of the roads in the vicinity where the persons lived whose affidavits were necessary to be procured, and I was also delayed and embarrassed by lack of means to defray necessary expenses in and about this work, but I believe that I proceeded with all the diligence that could fairly be expected under the circumstances above set forth.

I further say that during the transaction of said work I secured the certificates of commitment of Patrick Dwyer in the Hudson River State Hospital for the Insane, and the other papers relating to the insanity and commitment of said Patrick Dwyer, and that said papers are authentic and can be legally and properly verified, as well as the fact of the insanity of said Dwyer on the hearing. Said Dwyer was a brother of the mother of said Mary Mabel Rogers.

In March, 1905, while engaged in the prosecution of the work of preparing affidavits, as above stated, I learned from Dr. Le Roy McWayne that he had knowledge of the facts which are more fully set forth in the affidavit signed by him and attached to the petition in this case, and I drew up said affidavit in accordance with the facts as he gave them to me, but before I was able to prepare and present it to him for signature he was taken ill with pneumonia. I waited a long time while Dr. McWayne was very seriously ill, and he finally executed the affidavit at a time when, although he was entirely conscious and fully understood and realized what he was doing, yet his condition was such that
70 he was not expected to recover. Since the execution of said affidavit, which was done on the day when the execution bears date, I learn that said McWayne is somewhat improved and that there is now some prospect of his ultimate recovery, but I say on information and belief that he will be wholly unable to testify as a witness for several weeks to come under the most favorable conditions, and I expect to procure and to attach hereto the proper affidavits of the attending physician or physicians to that effect.

I further say that I have been greatly embarrassed in the work of procuring affidavits by the opposition of an aunt of said Mrs. Rogers, who is bitterly opposed to any proof of insanity in her family.

I have encountered many overt acts of hostility and hinderance in the work aforesaid, evidently caused by the efforts of said aunt, and much delay and difficulty has been occasioned thereby.

I further say that the fact of insanity in the family of the mother of said Mabel Mary Rogers, and probably the fact of the insanity of the father of said Mabel Mary Rogers can be abundantly proven by the evidence not only of the witnesses whose affidavits I have procured and attached to this petition, but also by the evidence of a large number of other witnesses, and that likewise the fact that said Mabel Mary Rogers was of weak mind, dull and stupid, and far below the normal mental development, can be proved in like manner, not only by witnesses whose affidavits are attached, but by many others; that substantially all of said witnesses, who number from 20 to 30, live in the State of New York, and that I understand and believe that their attendance in the State of Vermont upon such a cause as this, viz, a petition for a new trial, can not be compelled by legal process, and that the only means of getting their testimony would be the appointment of a commission by the court hearing the cause with authority to sit and take testimony in the State of New York, and that thereupon under the laws of New York a sub-
71 pœna can be secured. Many of the witnesses whose testimony is important, and even essential, in my opinion, will not testify unless legally subpœned, and this situation is largely due to the opposition which I have encountered as above described.

I therefore say that it is essential to a proper hearing of the petition, that a commission be issued from the Supreme Court of the State of Vermont, or from some of the judges of said court if individual judges have such authority.

I further say that I have not at hand the means that would be requisite and necessary to defray the legal expenses of such witnesses if they had to come to Vermont, although I firmly believe that by the contributions of charitable persons sufficient funds can be raised in the near future to defray such necessary expenses of witnesses for attendance before a commission in New York.

CHAS. A. McCARTHY.

Sworn to before me this 18th day of April, 1905.

JAMES S. SCOTT,
Notary Public, Rens. Co., N. Y.

STATE OF NEW YORK,
Rensselaer County, ss:

WILLIAM P. HAYNES being duly sworn deposes and says:

That he is a resident of the village of Hoosick Falls, county of Rensselaer and State of New York.

Deponent further says, that he is the town clerk of the town of Hoosick, in said county and State aforesaid, and as such officer has charge of the records of vital statistics in said town.

That he has searched the records of said town for a record of the birth and also of the marriage of Mary Mabel Rogers, who deponent
72 is informed and believes is now confined in Windsor prison in the State of Vermont under sentence of death for the murder of her husband, Marcus Rogers, and that this deponent has been unable to find any record of the birth of said Mary Mabel Rogers in the town records of the town of Hoosick.

Deponent further says that the certificate hereto attached is a true and correct copy of the record of the marriage of the said Mary Mabel Rogers now on file in the office of the clerk of the town of Hoosick, county of Rensselaer and State of New York.

W. P. HAYNES, *Town Clerk.*

Sworn to before me this 18th day of April, 1905.

CHAS. A. McCARTHY,
Notary Public, Rens. Co., N. Y.

Town of Hoosick, village of Hoosick Falls.

Certificate and record of marriage.

Registered No. 442.

I hereby certify that Marcus Merritt Rogers and Mary Mabel Bennett were joined in marriage by me, in accordance with the laws of the State of New York, at Hoosick this 18th day of Dec., 1898.

(Signature of person performing the ceremony.)

Rev. E. D. TIBBITS.

Residence, Hoosick.

Groom's full name, Marcus Merritt Rogers.

Residence of groom, Hoosick.
Age, 28.
Color, W.
Occupation, farmer.
Single or widowed, S.
Birthplace of groom, Petersburgh, N. Y.
Father's name, James Rogers.
Mother's maiden name, Alice Philpot.
Number of groom's marriage, 1.
73 Bride's full name, Mary Mabel Bennett.
Residence of bride, Hoosick.
Age, 18.
Color, W.
Single or widowed, S.
Birthplace of bride, Hoosick, N. Y.
Father's name, Charles Bennett.
Mother's maiden name, Josie Dwyer.
Number bride's marriage, 1.

STATE OF NEW YORK,
Rensselaer County, ss:

GEORGE M. LAMB, being duly sworn, deposes and says:

That he is a resident of, and a practicing physician of the village of Hoosick Falls, Rensselaer County, New York. That he was on or about the 1st day of October, 1880, duly licensed to practice *to practice* medicine in the State of New York, since which time he has been engaged in the practice of medicine in the village of Hoosick Falls aforesaid.

Deponent further says that Doctor Leroy D. McWayne of the village of Hoosick Falls is now, and has been for two months, confined to his bed with bronchial pneumonia. That this leponent has frequently, during the illness of said Doctor McWayne, been in attendance upon said Doctor McWayne professionally.

Deponent further says that he believes the said Doctor Leroy D. McWayne is slowly convalescing, and that he will ultimately recover from his illness.

Deponent further says that said Doctor Leroy D. McWayne will not be able to attend court or testify in any proceedings for at least two months, on account of serious illness through which he is passing and his general debilitated condition.

Deponent further says that he has well known Doctor Leroy D.
74 McWayne for upwards to twenty years, and that the said Doctor Leroy McWayne is a person highly respected, a reputable physician, and a physician of high professional standing, and when not restrained by illness from attending to his business, enjoys a large and lucrative practice.

GEORGE M. LAMB, M. D.

Sworn to before me this 18th day of April, 1905.

CHAS. A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

STATE OF NEW YORK,
Rensselaer County, ss:

JOHANNA CALLAHAN, being duly sworn, deposes and says:

That she is a resident of the town of Hoosick, county of Rensselaer, and State of New York, and is the mother of Mary Mabel Rogers, who is now confined in Windsor prison, in the State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers.

Deponent further says that said Mary Mabel Rogers was born in the town of Hoosick, county of Rensselaer, and State of New York, on the 9th day of March, 1883.

Mrs. JOHANNA CALLAHAN.

Sworn to before me this 18th day of April, 1905.

CHAS. A. McCARTHY,
Notary Public, Rens. Co., N. Y.

STATE OF NEW YORK,
Rensselaer County, ss:

JOHANNA CALLAHAN, being duly sworn, deposes and says:

That she is a resident of the town of Hoosick, county of Rensselaer, and State of New York; that she is the mother of Mary Mabel
75 Rogers, who is now confined in Windsor prison, State of Vermont, under sentence of death for the murder of her husband, Marcus Rogers, and that Charles Bennett, now deceased, was the husband of this deponent and father of Mary Mabel Rogers.

Deponent further says, that during all the time she lived with the said Charles Bennett, and from the date of her marriage to him, the said Charles Bennett was addicted to the use of alcoholic liquors, and that he frequently came home beastly intoxicated, and would severely beat, wound, and illtreat this deponent, and demand whatever money she had saved from her labors that he might obtain more liquor. That the said Charles Bennett seldom worked and failed to supply this deponent with food or clothing, nor did the said Charles Bennett at any time properly support or maintain this deponent.

That the said Charles Bennett would frequently be taken with a fit of violent anger, and at such times seemed to be possessed of an uncontrollable and morbid impulse to do this deponent or some other person violent injury, and at such times seemed to be without will power or reason. That her said husband was illiterate, was possessed of low, depraved nature, was morally a degenerate and was mentally weak.

Deponent further says, that for some time previous to the birth of her child, Mary Mabel Rogers, her husband became more venomous and insane in his actions towards her, frequently in a violent passion threatening to kill this deponent before her child should be born, saying to this deponent that he would surely kill her child as soon as it would be born. That on account of the violent and insane actions of her said husband this deponent was constantly in fear of her said life.

Deponent further says, that a few hours before the birth of her said child, her husband, in one of his insane moods and fits of violent passion, and while this deponent was seriously ill in bed, with the intention, this deponent believes, of carrying out his frequent threats to kill this depo-

nent, came into the room of this deponent where she was ill in
76 bed, barricaded the door from the inside and threatened her that he would kill her. That others who were present obtained an entrance to the room and induced her said husband to depart therefrom before he was able to do her injury.

Deponent further says, that a few days after the birth of her child, and while this deponent was yet ill in bed with her new-born babe, the said Charles Bennett came into the bedroom occupied by the deponent and her child, and that the said Charles Bennett, at the same time saying that he intended to kill the infant, made an effort to kill the child by smothering it with the bed clothes, which he held tightly over the face and head of the infant; that this deponent was unable to offer any resistance, but called loudly for help; that assistance came and her said husband was ejected from the room; that thereafter the said Charles Bennett, her husband, departed from her home, and she did not see him again for several months.

Deponent further says, that when her child, the said Mary Mabel Rogers, was about six months old, her husband, the said Charles Bennett, returned to her home at Hoosick, and representing to this deponent that he had obtained work and that he would treat her in a more humane manner thereafter, and that he would then be able to support her and her child, and after repeated intreaties and much persuasion induced this deponent to take her child and go with him to Utica, New York; and while they were in their room in the hotel where they were then stopping her husband, the said Charles Bennett, made several attempts to kill her said child by poisoning it with laudanum, and in one of these attempts nearly succeeded. That this deponent noticed the said Charles Bennett giving a dose of laudanum to her said child, and noticing that the child was in distress, immediately obtained the service of physicians, who after several hours' labor resuscitated the child and saved her life. That
the said Charles Bennett was arrested, and this deponent with
77 her child returned to her home at Hoosick, New York, with her sister, who, having learned of her trouble, came after her.

Mrs. JOHANNA CALLAHAN.

Sworn to before me this 18th day of April, 1905.

CHARLES A. MCCARTHY,
Notary Public, Rens. Co., N. Y.

Affidavit of James C. Reilly.

I, JAMES C. REILLY, of Rutland, in the county of Rutland and State of Vermont, on oath depose and say, that in August, 1902, I was assistant superintendent in charge of the office of the Metropolitan Life Insurance Company at Bennington; that Marcus Rogers had a policy for five hundred (500) dollars with said company of the kind known as industrial. On the morning after his body was discovered, his wife, Mabel Rogers, came to the office of the company bringing the policy and receipt book; she came in response to my request, as I had personally left a message for her the night before to come to my office the following morning and bring the policy and receipt book.

I was called as a witness at the trial, and I testified to all the foregoing facts, in response to questions which were put to me, excepting the fact that I had called upon Mrs. Rogers requesting her to come to my office with the policy and receipt book; no questions were asked of me on this latter subject, and I did not then tell of it solely because the inquiry was not made. I had no intention of concealing anything. Afterwards, I personally know from what I learned of the trial, that it appeared from my testimony, that Mrs. Rogers had come to my office without being sent for or asked to come, with the policy and receipt book, and that this circumstance was relied on as showing a motive and purpose for her crime. I had not thought of putting my testimony
78 in any shape to give any false impression, and I am satisfied that the circumstance which I have above related, viz, of my calling upon Mrs. Rogers to come to my office, if it had been known, would have given an entirely different meaning and color to the fact that she did come with the policy and receipt book for the purpose of collecting the insurance money.

Some time in the summer of 1902 I called on Mrs. Rogers and urged her to pay an overdue premium on this policy; she did not want to do so. I remarked that the policy would lapse, but she seemed indifferent in regard to that. I finally got her to write to her husband and to ask him to pay it. She agreed to do this, but upon my request, and after I had urged her to do so.

I now say, to the best of my recollection, but of this I am not positive, that the fact that she urged her husband or requested him to pay up the premium on this policy, was used as evidence against Mrs. Rogers on the trial, and without any explanation such as I have hereinabove give'. And further I say not.

Rutland, Vt., April 11th, 1905.

JAMES C. REILLY.

Subscribed and sworn to this 11th day of April, A. D. 1905.
Before me,

THOMAS W. MOLONEY, *Notary Public.*

I, E. G. HALL, M. D., of the city of Rutland, county of Rutland, and State of Vermont, on oath depose and say, that I am a practicing physician in the city of Rutland and have been so for seven years; that I attended Mrs. Rogers during her imprisonment at the House of Correction when she was delivered of a stillborn child, at, I should say, full term.

Date of birth was Dec. 16, 1902.

E. G. HALL,
79 *Physician to House of Correction.*

Subscribed and sworn to before me this 27th day of April, A. D. 1905.

EDWARD D. MAGUIRE,
Notary Public.

I, F. C. ARCHIBALD, of Manchester, State of Vermont, being first duly sworn, on oath depose and say, that I am a practicing attorney, residing in said Manchester; that I assisted Daniel A. Guiltinan, esq., assigned counsel, in the defense of Mary M. Rogers, now confined in the State prison at Windsor, Vt., under sentence of death; that I was

requested to assist in the trial of her case but a few hours before the commencement of her trial, and met her for the first time and talked with her the evening before the date of beginning the trial; that all knowledge I had of her and of the history of her family and of herself was acquired during said trial; that I gained no knowledge of insanity or mental weakness in her family or herself until several months after she was convicted of the crime of murdering her husband, Marcus Rogers, nor was it even intimated to me during the trial, either by herself or any other person, that there had been insanity in some members of her father's or mother's family; that my interviews with her and her actions during the progress of the trial convinced me that she was mentally weak, and very much below the average person in mental force. Of her condition of pregnancy at the time when her husband was killed I did learn during the trial. She was wholly without funds to procure the attendance of witnesses who might have testified to her mental condition, even if the facts as now claimed, respecting insanity in some of her immediate relatives, had been known to me at that time.

Dated at Manchester, Vt., this 26th day of April, 1905.

Before me,

W. H. ROBERTS, *Notary Public.*

80 I, DANIEL A. GUILTINAN, of Bennington, in the county of Bennington, and State of Vermont, on oath testify and say, that I am an attorney at law in practice at said Bennington; that at the June term, 1903, of Bennington County Court I was assigned by the court to defend one Mary M. Rogers, who, at said June term, 1903, of said court, was, by the grand jury of said county, indicted for the murder of her husband, Marcus Rogers, at Bennington, in said county, during the month of August, 1902; that the said Mary M. Rogers was put on trial on said charge at the December term, 1903, of said Bennington County Court, and I, with Frank C. Archibald, attorney, of Manchester, in said county, conducted the defense of said respondent, Mary M. Rogers; that the said respondent, Mary M. Rogers, was found guilty of murder in the first degree and sentenced to be executed on the third day of April, A. D. 1905; that at the time of said trial I did not know and had not heard that the said Mary M. Rogers was or ever had been insane; that I did not at said trial know and had not heard that either of the parents of the said Mary M. Rogers was then or ever had been insane or afflicted with insanity; that at the time of the said trial I did not know and had not heard that there was or ever had been a case of insanity among any of the relatives of the said Mary M. Rogers, and that insanity was not urged as a ground of defense in the trial of the said Mary M. Rogers at the said December term, 1903, of Bennington County Court.

DANIEL A. GUILTINAN.

STATE OF VERMONT,
Bennington County, ss:

At Bennington, in said county, on this twenty-ninth day of April, A. D. 1905, personally appeared Daniel A. Guiltinan and made oath to the truth of the foregoing affidavit by him subscribed.

Before me,

EDWARD L. BATES, *Notary Public.*

81 *Supplemental affidavit of F. C. Archibald.*

I, F. C. ARCHIBALD, of Manchester, in the county of Bennington, on oath depose and say, that at the time and before the trial of Mary Mabel Rogers I had no knowledge whatever of any evidence that would show that the skull of said Marcus Rogers was fractured at the time of the alleged murder, and I had no information whatever on the subject of any injury to the head of said Rogers, except what appears in the transcript of the testimony, which was, in substance, to the effect that the injury to the head was slight and could not be regarded as a cause of death.

I further say that I have examined the affidavit of James C. Reilly, and that the matters therein disclosed were not known to me at the time of said trial, and I did not know, and had no reason to believe, that said Reilly had in fact sent for and requested Mrs. Rogers to come to this office before she came.

I further say that said incident described in said Reilly's affidavit was an important factor in the proof of motive and premeditation on the part of the prosecution, and that I believe the matter that is disclosed by Mr. Reilly, if known at the time, would have modified and explained this incident so as to have made the same entirely innocent, whereas in fact it was a very important circumstance looking for the conviction of the respondent of murder in the first degree.

F. C. ARCHIBALD.

Subscribed and sworn to this 1st day of May, A. D. 1905.
Before me,

THOMAS W. MOLONEY, *Notary public.*

82 STATE OF VERMONT,
Bennington County, ss. Supreme Court:

I, Harry T. Cushman, clerk of the Supreme Court for the State of Vermont for the county of Bennington aforesaid, hereby certify the papers hereunto attached to show a true copy of the original affidavits of Wilson S. Lovell, E. W. Oakes, Edward B. Flinn, Mary A. Hayes, Charles W. Corcoran, Helen F. Corcoran, William Stinton, Barney Smith, Teresa Smith, Louis Haussler, Jane Smith, William Brant, Leroy D. McWayne, Charles McCarthy, William P. Haynes, George M. Lamb, Johanna Callahan, James C. Reilly, E. G. Hall, F. C. Archibald, and Daniel A. Guiltinan, of the record of the proceedings in the matter of Patrick Dwyer, and of the certificate of Charles W. Pilgrim, M. D., and of Shepard Tappen, clerk of the county of Rensselaer, and of the certificate and record of marriage of Marcus Merritt Rogers and Mary Mabel Bennett, all being attached to the petition for a new trial of the said Mary M. Rogers, filed in this court on the sixth day of May, 1905, as the same appear among the records and files of said Supreme Court now remaining in the office of the clerk of said court at Bennington, in the county of Bennington aforesaid.

In testimony whereof I have hereunto set my hand and attached the seal of said Supreme Court at Bennington, in said county of Bennington, this 24th day of July, anno Domini 1905.

[L. S.] HARRY T. CUSHMAN, *Clerk.*

83 UNITED STATES OF AMERICA.

To Henry H. Peck and Wilson S. Lovell, of the county of Windsor, and Clarke C. Fitts, attorney-general of the State of Vermont, of Brattleboro, in the county of Windham, greeting:

You, and each of you, are hereby cited and admonished to appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the District of Vermont, wherein Mary Mabel Rogers is appellant and Henry H. Peck and Wilson S. Lovell are respondents, to show cause, if any there be, why the judgment in said cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

July 5, 1905.

HOYT H. WHEELER, *Judge.*

84 BRATTLEBORO, VERMONT, *July 5th, 1905.*

I hereby accept service of the within citation, waiving copy and formal service.

CLARKE C. FITTS,
Attorney-General of the State of Vermont.

(Indorsed:) United States District Court, District of Vermont. In re Mary Mabel Rogers, habeas corpus. Citation. Returned, service accepted, July 10th, 1905. Geo. E. Johnson, clerk.

85 UNITED STATES OF AMERICA,
District of Vermont.

I, Geo. E. Johnson, clerk of the District Court of the United States of America for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 84, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of Mary Mabel Rogers, writ of habeas corpus, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of Burlington, in said District of Vermont, in the Second Circuit, this 1st day of August, A. D. 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] GEO. E. JOHNSON, *Clerk.*

86 (Indorsed:) United States District Court, District of Vermont. In the matter of Mary Mabel Rogers, habeas corpus. Transcript of record. Office of the clerk Supreme Court U. S. Received Aug. 3, 1905.

87 (Indorsement on cover:) File No. 19870. Vermont D. C. U. S. Term No. 368. Mary Mabel Rogers, appellant, vs. Henry H. Peck and Wilson S. Lovell. Filed August 7th, 1905. File No. 19870.

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FILED
OCT 10 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

MARY M. ROGERS,
Appellant,
vs.
HENRY H. PECK, Sheriff of Windsor County, and WILSON S. LOVELL, Superintendent of Vermont State Prison,
Appellees.

368.

No. 368. October Term, 1905.

Brief in Opposition to Motion to Advance.

F. M. BUTLER,
T. L. JEFFORDS,
Counsel for Appellant.

PRESS OF BYRON S. ADAMS

Supreme Court of the United States.

MARY M. ROGERS,
Appellant,

vs.

HENRY H. PECK, Sheriff of Windsor County, and WILSON S. LOVELL, Superintendent of Vermont State Prison,
Appellees.

No. 368. October Term, 1905.

Brief in Opposition to Motion to Advance.

Statement.

Appellant was in Bennington County Court, Vermont, convicted of murder and sentenced to be hung February 3, 1905.

February 1, 1905, the Governor of Vermont reprieved her until June 2, 1905.

June 1, 1905, the Governor further reprieved her to June 23, 1905.

June 22, 1905, the Governor further reprieved her to December 8, 1905.

April 29, 1905, appellant was allowed by the Supreme Court to file her petiton there asking for a new trial. Hearing was had on that petition, and May 30, 1905, petition was dismissed.

June 19, 1905, appellant filed her petition for writ of habeas corpus in the United States District Court for the District of Vermont, and such writ was issued on the same day, hearing had June 21, 1905, and June 22, 1905, the writ was discharged and appellant remanded to her former custody. On the same day, and concurrent with this action by the United States District Court, the Governor of Vermont granted her the hereinbeforementioned reprieve from July 22, 1905, to December 8, 1905.

Thereupon appeal was taken to this Court.

Appellee Lovell is the Superintendent of the Vermont State Prison, which is located at Windsor, in the County of Windsor, where appellant is imprisoned, and appellee Peck is the Sheriff of Windsor County, who, under the law of Vermont, is to execute the death sentence pronounced upon Vermont convicts.

Argument.

Any person convicted of murder in Vermont may present a petition to the Supreme Court of the State asking for a new trial upon grounds stated in the petition. The petition must be presented to two of the Judges of the Supreme Court. If they shall permit said petition to be filed and hearing had thereon, it is expressly provided by the law on that subject that the two judges *shall* stay execution of death sentence until after time fixed for hearing.

Vt. Stat., Sec. 1998.

It is further expressly provided in same act that, if the Supreme Court shall, upon hearing, deny petition for new trial, it *shall* appoint a time for executing the death sentence.

Vt. Stat., Sec. 1999.
Act No. 19 of Session Laws, 1878.

Appellant was heard on such a petition, which was dismissed.

Opinion of court in dismissing petition is found in Atlantic Reporter Advance Sheets of September 7, 1905. Special attention is called to the dissenting opinion of two judges, which follow opinion of the court. This is an exceptional case, because the highest court of the State was not a court held in the county, as required by the Constitution, and had to pass upon its own status.

Judges of the Supreme Court of Vermont sit as trial judges in county courts, and sit in banc as the Supreme Court.

The same judge that sat as trial judge in the case of appellant also sat in the hearing of said petition, and delivered the opinion of the court.

Besides the trial judge, who sat with the court in banc, there were only five judges, and so the opinion of the court is in reality by three of five judges, while the law requires four.

Vt. Stat., Sec. 996.
Act No. 28 of Session Laws of 1892.
Act No. 37 of Session Laws of 1898.

Right of Appeal Denied.

Appellant was tried with a co-defendant, who testified at length for the State, but refused to answer certain material questions upon cross-examination on the ground that it would tend to incriminate him. Although a co-defendant, he has been found guilty of a less offense than murder and given a term sentence in the Vermont State Prison.

If it be asked why appellant did not take her appeal on account of errors of trial court, the answer is that the Legislature of Vermont has abolished the only court to which appeal would lie.

> Act No. 36 of Session Laws of 1898.
> Act No. 28 of Session Laws of 1892, which repealed Secs. 783, 4, 5, 7, 8 of the Revised Statutes of Vermont, fixing time and place of holding Supreme Court.

The Constitution and Laws of Vermont require a Supreme Court to be maintained in each county.

> Constitution of Vermont, Chap. 2, Sec. 4.
> State *vs.* Peterson, 41, Vt., 515, at page 518.
> Vermont Statutes, Secs. 1007, 1012.

Equal protection of the Laws Denied.

A citizen of the State of Vermont residing in Washington County, where the capital of the State is located, is provided with a Supreme Court in that county, to which appeal will lie; but this is not true of any citizen of any other county in the State.

This denies all the citizens of the State of Vermont outside of Washington County that equal right of appeal

which is guaranteed by the Constitution of the State. Chap. 2, Sec. 4. This is violation of the Fourteenth Amendment to the Constitution of the United States.

Had appellant been tried for murder by a jury of less than twelve or by a jury composed in part of known minors or known lunatics, or a verdict of murder had been rendered against her by seven of twelve jurors, there could be no doubt that she was deprived of rights guaranteed by the Fourteenth Amendment to the Constitution. Yet, were this true, she, nevertheless, would have, as in the case at bar, no redress except by coming to this Court.

No Valid Death Sentence in Force and No Law Providing Authority to Pronounce One.

The provision of the before-mentioned law for stay by Supreme Court of execution, and fixing time by same court for execution of sentence exclusively, shows that the trial court had no control over the sentence. The Supreme Court having taken jurisdiction, it alone had authority to fix the time, the time fixed by trial court having elapsed.

The Supreme Court, however, did not stay execution of death sentence and did not fix a time for carrying it into effect. It now has no jurisdiction to do so.

Sentence of trial court that appellant be executed February 3, 1905, cannot be carried into effect.

That court has no jurisdiction to pass a new sentence or fix a time for executing the death sentence it did pass. That court has adjourned without day.

There is no court or officer or person who can now lawfully pronounce sentence of death upon appellant, or can fix a time for carrying the death sentence of the

trial court into effect, or lawfully cause the death penalty to be inflicted upon her, for the offense for which she has been convicted, unlawfully as she claims.

The law of Vermont provided a way for her legal trial and execution, but those laws have not been followed, and she is now imprisoned without right or authority, and unless this Court makes available to her the guarantees of the Constitution of the United States she will be executed at some future time, about fixing the date of which she cannot be heard, although the law of Vermont provides she may be heard as to that.

The Governor of the State has granted several reprieves, and the latest one granted, June 22, 1905, after this proceeding was begun, June 19, 1905, is null and void, and of no force and effect, under Section 766 of the Revised Statutes of the United States.

Transcript Incomplete.

In discharging the writ of habeas corpus the judge of the United States District Court rendered an oral opinion, and when printed a considerable part of it was omitted. The omission was overlooked in preparing the transcript, which now contains only the abridged opinion.

Unabridged opinion is published in Advance Sheets No 7, of September 7, 1905, of Vol. 138, Fed. Rep.

Counsel for appellant think it necessary, therefore, that transcript should be amended, and unless counsel can stipulate accordingly certiorari may be necessary.

Counsel for appellant desire the Court to see amended and complete transcript before deciding this motion to advance. Reasonable time and needful orders of this Court, if found necessary, are respectfully asked.

Counsel for appellees have made a motion to advance this cause so that it may be heard and disposed of before December 8, 1905, and, as counsel for appellant think that time too short, respectfully oppose the motion to advance.

F. M. BUTLER,
T. L. JEFFORDS,
Counsel for Appellant.

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Office Supreme Court U. S.
FILED
NOV 6 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 368.

MARY MABEL ROGERS, APPELLANT,

vs.

HENRY H. PECK AND WILSON S. LOVELL,
APPELLEES.

BRIEF FOR APPELLANT

F. M. BUTLER,
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McGILL & WALLACE, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

October Term, 1906.

No. 368.

MARY MABEL ROGERS, *Appellant*,

vs.

HENRY H. PECK AND WILSON S. LOVELL, *Appellees*.

BRIEF FOR APPELLANT

Statement of Case.

The petitioner was convicted in the County Court in and for the County of Bennington, at the December Term, 1903, of murder in the first degree, and no exceptions having been filed, sentence was imposed by said County Court at said term. The sentence was that the petitioner be confined at hard labor at the State Prison

in Windsor until November 3, 1904, and that on and after November 3, 1904, she should be kept in solitary confinement in said prison until February 3, 1905, and should then be hanged.

On February 1, 1905, the Governor of Vermont reprieved the execution of said sentence until June 2, 1905.

On April 29, 1905, the petitioner presented to two Judges of the Supreme Court of the State of Vermont her petition for a new trial. Said petition is based upon newly discovered evidence and errors claimed to have been committed in the trial in Bennington County. The newly discovered evidence consists of two classes, viz: Evidence tending to show the insanity of the petitioner herself at the time when the crime was committed and showing insanity in her family and among her near relatives; and, second, evidence showing confessions made by the accomplice upon whose testimony petitioner was convicted, to the effect that the testimony so given by him was false, and corroboration of such falsity by the appearance of the body after death, from which it was claimed that the cause of death was entirely different and inconsistent with that claimed at the trial.

The two Judges of the Supreme Court examined and considered said petition, and on May 5, 1905, made an order allowing the same to be filed, and that the same be heard by the Supreme Court on the 10th day of May, 1905, and accordingly said petition was heard on said day by the Supreme Court of the State of Vermont at Montpelier, in the County of Washington, and was

argued by counsel; and thereafter, on the 30th day of May, 1905, a majority of said Court dismissed said petition and refused said new trial, but in so doing no time was fixed for the execution of said sentence, nor was any hearing given thereon by said Court. Neither said two Judges to whom said petition was presented, nor the Supreme Court in which said petition was filed, and which took jurisdiction of the case, ordered any stay of execution of the petitioner.

On June 1, 1905, the Governor of Vermont issued and gave to the defendants an order directing them to execute the the petitioner on June 23, 1905: Then a petition for a writ of *habeas corpus* was filed with the District Court of the United States within and for the State of Vermont on June 19, 1905, and was heard on June 21; and on June 22, the order was made from which this appeal is taken. On the same day, and while the *habeas corpus* proceedings were pending, the Governor of Vermont again issued an order to the defendants commanding them to execute the petitioner on the 8th day of December, 1905. This appeal was allowed on the same day (June 22). During all of the time from November 3, 1904, up to the time of the hearing, the petitioner was held by the officials of the State of Vermont in solitary confinement.

The County Court of the County of Bennington has, by law, original jurisdiction of criminal offenses committed within that County. By the present statute, appellate jurisdiction to review questions raised on the trial is given to the Supreme Court of the State, which

sits only at Montpelier, in the County of Washington. Prior to 1898, the Supreme Court for the County of Bennington had existed by law, and held its sessions in said County of Bennington; Supreme Courts were also established in all the other Counties in the State; but by Act No. 36 of the Laws of 1898, a Supreme Court for all the Counties was required to be held at Montpelier, in the County of Washington. No Supreme Court has since been held or maintained in the County of Bennington.

Specification of Errors.

The United States District Court for the District of Vermont erred in discharging the writ of *habeas corpus* and remanding appellant to her former custody in the State prison in the County of Windsor in the State of Vermont, and in not discharging appellant from custody.

First: Because the petitioner was and is deprived of her liberty by the State, and subjected to the punishment of solitary confinement without any statute authorizing such punishment, and without any sentence of any Court directing such punishment, and therefore without due process of law.

Second: Because the Supreme Court of Vermont, having taken jurisdiction of the petition for a new trial, and having failed to comply with the requirements of law in respect of ordering a stay of execution and fixing the time for the execution of the petitioner, has failed to fix a day for the execution, and the governor of Vermont has no right or authority to fix such day, and the peti-

tioner is being held to be executed in accordance with a precept not authorized by law, and which is not in and of itself due process of law.

Third: Because the State of Vermont, having failed to maintain an appellate Court in the County of Bennington, as required by its constitution, has deprived the relator of the opportunity to be heard by a Court of competent jurisdiction, and thus deprived her of due process of law.

Fourth: Because the governor of Vermont, having issued his order requiring execution of the petitioner on December 8, while proceedings were pending in the Courts of the United States for her relief on *habeas corpus*, said order of the Governor is to be deemed null and void, and the petitioner should be released from custody thereunder.

Argument.

Solitary Confinement.

The petitioner, at the time of the filingof this petition, had suffered the punishment of solitary confinement from November 3, 1904, until June 19, 1905, substantially six and one-half months. She had been sentenced by Bennington County Court in December, 1903, to hard labor until November 3, 1904, and then to solitary confinement until February 4, 1905, on which day she was to be executed.

These facts were conceded in the officers' return on the writ, and are not denied, and are found by the Court as appears from the findings and opinion.

It is, therefore, established, that at the time of filing of this petition, the petitioner had suffered the punishment of solitary confinement for three and one-half months more than the term provided by the sentence of the Court. The Statute which authorized said sentence is Sec. 2007 of Vermont Statutes, which reads as follows:

"When execution is not to take place until after six months from date of sentence, the court at the same time shall sentence the respondent to hard labor in the State prison or house of correction until three months before the time fixed in the sentence of death for execution thereof, and shall also sentence him to solitary confinement in the State prison or house of correction from the expiration of the sentence to hard labor until the time of execution."

Until this statute, the longest term allowed, and the only term allowed, during which the respondent can be punished by solitary confinement, is three months, and that immediately preceding "the time fixed in the sentence of death for execution thereof."

It can not be denied that the petitioner was and is being held by the State of Vermont through its officials, and that she is by them made to suffer a penalty and punishment, both in excess of what the law of the State permits, and of what the sentence of the Court required.

On behalf of the petitioner it is contended that she is deprived of liberty by the State without due process of law. Solitary confinement with the sentence of death is held to constitute, in and of itself, a separate and severe

punishment in addition to being in custody until execution by hanging.

Medley's case, 134 U. S. 160.

The principle laid down in Medley's case applies to this. In that case this Court held the petitioner entitled to relief, because the statute which imposed the punishment of solitary confinement was passed after the crime had been committed, and the petitioner thus deprived of the protection of the provision, in that behalf, of the Constitution of the United States; while here the petitioner shows that she is deprived of liberty, and is being subjected to severe punishment by the State of Vermont without any process whatever, and in violation of the protection granted her by the Fourteenth Amendment of the Constitution of the United States.

The principle involved is the same, though in its application relates to two separate clauses of the Federal Constitution.

It is quite as much an invasion of the rights guaranteed by the Federal Constitution for a State to imprison a person and subject him to severe punishment, without any law, sentence or warrant of commitment authorizing such separate punishment, as it is to prosecute such person under an *ex post facto law*. And whenever a citizen is denied a right guaranteed by the Federal Constitution, or is subjected to a penalty forbidden by it, the Federal courts have jurisdiction and may grant relief.

Ex parte Royall, 117 U. S., 241.

The reason for the rule which requires, ordinarily, that proceedings shall be by writ of error and not by *habeas corpus*, does not obtain here. In making this contention, the petitioner does not seek to set aside the judgment of any State court.

II.

The petitioner is denied due process of law in another respect, viz: That if the time of her execution be the time fixed by the Governor of the State, such time has been fixed without any warrant or authority of law and contrary to law, because the Governor had, by the law of the State, no jurisdiction whatever to so fix it; and the Supreme Court, whose duty it was to fix that time and give the petitioner a hearing thereon, neglected to fix it, and thus refused the petitioner a hearing.

The State statutes here referred to are the following three sections:

"Sec. 1997. When a person is convicted of a capital offense and sentenced to be hanged, he may bring a petition for a new trial at any time before execution of sentence. Such petition shall set forth the grounds for a new trial, and if for newly discovered evidence, the same shall be attached thereto, with a copy of the evidence taken at his trial.

"Sec. 1998. Such petition shall be presented to two judges of the Supreme Court, who, upon examination thereof, shall determine whether it shall be filed, and shall certify their determination thereon; and if the petition is allowed to be filed, the judges shall make an

order staying the execution of sentence until after the time fixed for hearing the petition by the Supreme Court. No adjudication of a former petition shall be a bar to a subsequent one based upon evidence discovered after the former adjudication."

Sec. 1999. Where the trial of the petition does not take place until after the time appointed for execution, if a new trial is refused, the Court hearing the petition shall appoint a time for executing sentence, and issue its order to the sheriff for that purpose."

The case shows that the petitioner brought her petition for a new trial to the State Supreme Court at Montpelier, and that the same was examined by two judges, and allowed by them to be filed, but they made no order staying the execution. The petition was heard and denied by a majority of that Court.

All this was pending the first reprieve by the Governor, which fixed the execution of the petitioner for June 2, 1905. After this the Governor issued his warrant fixing the time of execution June 23d.

By virtue of the statute above quoted, the Supreme Court had jurisdiction of this cause when the petition for a new trial was filed. It was then the duty of the judges to make an order staying execution of sentence, and upon the denial of the petition, *to "appoint a time* for executing sentence." These provisions of the law are mandatory in form. They were entirely disregarded in this case, and consequently the Court, and the only Court that can be said to have had jurisdiction, failed to fix a date for execution as the law required.

It is, therefore, plain that no date is now legally fixed for the execution of the prisoner. The Supreme Court having taken jurisdiction, the sentence of the inferior Court was superseded and vacated so far as the time appointed for execution is concerned if the execution was to take place before the trial occurred in the Supreme Court. The time appointed by the inferior court, was the time fixed, and no other sentence has been given.

If we assume that the Governor had the right to reprieve from the sentence of the Court until June 2, he had no right to reprieve from June 2, nor from any date except such as might be fixed by the Court which, in the meantime, acquired jurisdiction, and no such date was ever fixed. The second and third reprieves are, therefore, entirely null and void, and the petitioner held for execution thereunder is detained without due process of law.

The provision of the Constitution "Nor shall any State deprive *any person* of life, liberty or property, without due process of law" is so plain and comprehensive that it requires no judicial construction. It applies to *any State* and *any person*. What the State does by its officers, it does itself. If the relator is unlawfully held in solitary confinement, and about to be unlawfully executed and put to death by the officers of the State, clothed with authority of the State, and looking to it for justification, then she is being deprived of her liberty and life by the State, and if such acts are without due process of law, it is directly in violation of that constitutional provision. (Art. 14, Sec. 1).

What is due process of law has been many times interpreted by the courts. The definitions given are somewhat conflicting, but it seems to be generally accepted that "law in its regular course of administration through courts of justice, is due process of law." When not so administered, it is not due process of law.

Hurtado *v.* Cal., 110 U. S., 516.

It surely would not be due process of law for a governor of the State to issue his warrant of execution, requiring the death penalty, without trial, conviction and sentence of any court. The right to issue the warrant must come through the recognized channel of an established court. If there is no judgment, sentence or time of execution fixed by a court having jurisdiction, there is nothing from which the governor can reprieve.

In the Storti case, it is stated in the opinion that "the petitioner was sentenced to be put to death at a given time, that he was not then put to death on account of a respite granted by the governor." In this case there was no sentence that she be *put to death at a given time.* The time had lapsed; another court had taken jurisdiction of the case; the sentence was superseded and vacated. *Habeas corpus* to release from imprisonment a person held under a State judgment should be denied without prejudice when the accused has not availed himself of such remedies as the laws of the State offered, but a federal court has jurisdiction to discharge from the custody of said officials *any person* restrained of his liberty in viola-

tion of the Constitution, and may exercise its discretion in the light of the circumstances.

State of Minnesota *v.* Brumdage, 180 U. S. 499, (455).

Markuson *v.* Boucher, 175 U. S., 184 (76).

The Constitution applies to any person. In the Leeper case, the court seems to have limited this provision to "particular persons, or classes of persons." By the use of these expressions, it can hardly be possible that the Supreme Court intended to amend or limit the express words, "any person," to a particular person or class of persons. It surely was intended to apply to any person, rich or poor, white or black, young or old, male or female.

Leeper *v.* Texas, 139 U. S., 462.

The reason of the rule that the court usually refuses to review the decisions of State courts or *habeas corpus* and compel resort to writ of error as stated in the leading case of Baker *v.* Grice, 169 U. S., 284, incidentally touches this case. This is a case of "peculiar urgency;" error is being committed since the judgment of the inferior court has been superseded or vacated by the Supreme Court. It is an attempt of the State by its officers to execute a sentence vacated by the court. There is no action of the court in this regard to which error can be assigned.

Tinsley *v.* Anderson, 171 U. S., 101.

Newport Light Co. *v.* Newport, 151 U. S., 527.

Pepke *v.* Cronan, 155 U. S., 100.

This is one of the cases of so exceptional a nature that this writ is the only course.

In re Nagle, 135 U. S., 1.
In re Loney, 134 U. S., 372.

The court *in re* Storti, 181 U. S., remarked that "the Federal Constitution neither grants nor forbids the governor of the State the right to stay execution of a sentence." This is true, but the Federal Constitution does forbid the governor of a State to execute a person without a valid sentence of any court.

The fixing of a time of execution is a part of the sentence. The time of execution is of more consequence than any part of it. (Vermont Statutes, 2004).

It would not be due process of law to allow a governor to enter a judgment, fix a penalty and time of execution, and carry that judgment into effect without trial in any court; he may extend, but he may not fix the time of execution.

The only authority vested in the governor is given by Article 8 of the articles of amendment to the Constitution of Vermont, which provides:

"That the supreme executive power of the State shall be exercised by the governor, or in case of his absence or disability, by the lieutenant-governor, who shall have all the powers and perform all the duties vested in and enjoined upon the governor and council by the 11th and 27th sections of the second chapter of the Constitution, as at present established."

And by Sec. 11 of Chapter 2 of the Constitution, which reads as follows:

"The governor, and in his absence the lieutenant-governor with the council, * * * shall have power to grant pardons and remit fines in all cases whatsoever except in treason and murder, in which they shall have power to grant reprieves, but not to pardon until after the end of the next session of the Assembly, and except in cases of impeachment, in which there shall be no remission or mitigation of punishment, but by act of the legislature. They are also to take care that the laws are faithfully executed."

III.

Unconstitutional Court.

Sec. 4 of Chapter 2 of the Constitution provides: "That courts of justice shall be maintained in every county in this State, and also in new counties when formed; each court shall be open for the trial of all causes proper for their cognizance, and justice shall be therein impartially administered without corruption or unnecessary delay." * * *

Referring to said section of the Constitution, the Supreme Court in State v. Peterson, 41 Vt., 515, Wilson, J., declared: "By this section of the Constitution relating to County and Supreme Courts, * * * it was and is made the duty and the right of the legislature to create such courts as the interest of the people and the proper administration of justice require." And, on page 518, the Court further says: "The fourth section of the Constitution requires that Supreme and County Courts shall

be maintained, and that these courts shall be open for the trial of all causes proper for their cognizance."

The legislature followed out that provision of the Constitution, established County and Supreme Courts, and provided that:

"Sec. 1007. A County Court shall be held in each county at the times and places appointed by law, consisting of one Chief Judge, who shall be a Judge of the Supreme Court, and two assistant judges, elected by the county, any two of whom shall constitute a quorum."

The legislature further provided:

"Sec. 1010. Each County Court shall have original jurisdiction of prosecutions for criminal offenses within their respective counties except those made cognizable by a justice and may award sentence according to law."

"Sec. 1012. The stated terms of the County Court shall be held each year as follows: In the County of Bennington on the first Tuesday in June and December," etc. * * * (giving times for all counties).

At a stated term of the County Court of Bennington County, in December, 1903, Mary M. Rogers was tried and convicted of murder and sentenced to be hanged February 3, 1905, between the hours of 1 and 2 o'clock in the afternoon.

The legislature, in pursuance of said article of the Constitution, established Supreme Courts, consisting of one Chief Judge and six assistant judges. The law provides:

"Sec. 989. There shall be a Supreme Court for the State, which shall be held at the times and places appointed by law."

"Sec. 990. Such courts shall consist of one Chief Judge and six associate judges, who shall be elected as provided by the Constitution."

"Sec. 993. The Supreme Court shall have exclusive jurisdiction of such petitions not triable by jury as are by law brought before it, and may issue and determine writ of error, *certiorari*, *mandamus*, prohibition and *quo warranto*, and other writs and processes to courts of inferior jurisdiction of corporations and individuals that may be necessary for the furtherance of justice and the regular execution of the laws, and may try and determine questions of law removed from the County Court pursuant to law."

Up to the year 1898 the law provided "That stated terms of the Supreme Court shall be held as follows: (fixing a time in each county), and provided that questions of law may pass to the Supreme Court for a final decision." The law then provided, section 783, Revised Laws: "The stated terms of the Supreme Court shall be held as follows: In the County of Addison on the first Tuesday after the third Monday in January; in the County of Bennington on the second Tuesday next after the fourth Tuesday of January," and so on, fixing a special time in every county in the State.

"Sec. 785—When the parties to any suit pending in the respective County Supreme Court agree in writing that such cause shall be continued to the then next general term of the Supreme Court, such County Supreme Court shall make the necessary order to carry such agreement into effect, provided that this act shall not be considered so as to prevent the County Supreme Court

from continuing any suit therein pending, to such general term."

This section was enacted by No. 21 of the Acts of 1880. It is also provided, Sec. 1623, Vt. Statutes—"Issues of law and questions of law arising upon the trial of an issue of fact by the Court or jury upon the record by the agreement of parties or allowance of Court determined by a County Court may pass to the Supreme Court for final decision."

The Legislature of 1898 passed an Act, No. 36, approved October 31, 1898, "Sec. 2—Three general terms of the Supreme Court for all the counties shall be held as follows: On the fourth Tuesday in January and October and the second Tuesday of May in each year at Montpelier, and special terms may be there held at such other times as the judges appoint. All cases on the docket of the Court in the several counties shall be heard at said stated terms."

This act is unconstitutional and void. Since the passage of this act no Supreme Court has been held in any of the counties except at Montpelier in the County of Washington. If any person convicted of crime in Bennington County, or in any other county in the State, desires to seek relief by the decision or questions of law in the Supreme Court, he must go to Washington County. It deprives the citizen of the United States of the right he had under the Constitution of the State of Vermont to a trial in the only Law Court having cognizance of his case established in the County. The County of Benning-

ton is deprived of a Supreme Court without the citizen consenting to go to Montpelier, a distance of about 200 miles; no other Court is provided or held to take the place of the Supreme Court in Bennington County.

Constitution Vt. Chap. 2, Page 4.
State v. Peterson, 41 Vt. 515.

Writ of Error Taken Away.

Sec. 1965 V. S. "No writ of error shall be allowed in a criminal cause prosecuted by complaint, information or indictment." This act is also unconstitutional; it takes away the right of every citizen to apply by writ of error to the only Court having jurisdiction to finally determine questions of law arising on the trial of a cause. The County Court has stated terms, and when the County Court adjourned, it adjourned without day, and no provision is made in the law of Vermont to reach the Supreme Court by writ of error or otherwise after the adjournment of the County Court. This is an abridgment of the rights of individuals and deprives a citizen of Bennington County of life, liberty and property without due process of law. The statute compelled this woman to go to Montpelier; it might as well have provided that the Supreme Court be held in New York or San Francisco, and that citizens of Bennington County must go there to try their cases. So far as she is concerned, it was, an illegal tribunal, and had no jurisdiction of her case without her consent. She should not be compelled to resort to that Court. The petition for a new trial shows that there was evidence of her insanity. If she

was insane, as the evidence tended to show, she could not be at fault in not placing upon the record the legal questions raised in the County Court or in not removing her case to the Supreme Court; in the course of the trial. As soon as the County Court adjourned her rights were absolutely cut off by these unconstitutional acts, and she is without redress.

Courts illegally constituted, whose judgment and sentence is void, do not furnish the citizen with due legal process. An indictment in a State Court obtained by unlawful discrimination is void.

Rogers *v.* Alabama, 195 U. S., 257.

The record shows that there is at least good ground for asserting that substantial error was made by the trial court, in that it permitted the accomplice, who testified against the petitioner, to refuse cross-examination; that he did so refuse, and was not cross-examined by reason of such refusal.

The petitioner filed no bill of exceptions in the Bennington County Court, and, by failing so to do, she is, by the law of Vermont, precluded from all remedy for errors by the trial court. She had no Constitutional court to apply to, and by the statute above quoted, she could not, after the adjournment of Bennington County Court, bring any writ of error to any Court whatever.

The rule is well settled that even a sane person can not waive anything in a capital cause.

People *v.* Barberi, 149 N. Y., 256.

Here is a woman claimed to be insane, who was examined by a physician and found to be insane two days before the crime was committed, and yet, by the law of Vermont as above stated, she must waive everything by reason of having failed to file a bill of exceptions during the December Term, 1903, of Bennington County Court.

Statutes which are so far in derrogation of common right can not be regarded as permitting due process of law.

From the very nature of the case it must be apparent that there is no other tribunal in which this question can fairly be raised and fairly tried except in the Federal Courts. The petitioner ought not to be compelled to go to the Supreme Court of the State of Vermont with a claim founded on the illegality of that Court's existence.

If there is a remedy for her, it must be in this Court, and if it is not in this Court, then there is no remedy anywhere, and the failure of this Court to take jurisdiction would amount to a denial of the Constitutional right she claims.

It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights can not be declined when it is plain that the very result of a decision is to deny the rights.

Rogers *v.* Alabama, *supra.*

IV.

Upon hearing this appeal, the Court will consider the question of the legality of the present detention of the petitioner. She is now held to be executed on December

8 next by virtue of an order of the governor of Vermont made on June 22, at a time when this petition was pending, it having been filed with the District Court on June 19. This order, or reprieve, of the governor was made without the request and against the protest of the petitioner. It is null and void under section 766, Revised Statutes of the United States.

In the brief filed by the appellees in this cause in support of a motion to advance the same, they practically aver that such a reprieve is void by the following statement:

"Further, that since under the Revised Statutes of the United States, section 766, any and every act under and by virtue of the laws and Constitution of the State of Vermont pending this appeal are null and void, the legality of any further reprieve by the governor until this cause is disposed of is doubtful."

The language of the statute is explicit and its meaning seems plain. There can be no question but what the order or reprieve aforesaid is such a proceeding as is covered by section 766, and this being so, the petitioner is now held to be executed by virtue of a proceeding that is made void by a statute of the United States and should be discharged from such unlawful detention.

It is respectfully submitted that the order of the United States District Court, from which the appeal is taken should be reversed.

F. M. Butler,
T. W. Moloney,
T. L. Jeffords,
Counsel for Appellant.

FILE COPY.

Office Supreme Court U. S.
FILED
SEP 18 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

MARY M. ROGERS, Appellant,

vs.

HENRY H. PECK, Sheriff of Windsor County,

and

WILSON S. LOVELL, Superintendent of Vermont State Prison,
Appellees.

No. 368. October Term, 1905.

MOTION OF APPELLEES TO ADVANCE.

Supreme Court of the United States.

No. 368. October Term, 1905.

Mary M. Rogers, Appellant

vs.

Henry H. Peck, Sheriff of Windsor County,

and

Wilson S. Lovell, Superintendent of Vermont State Prison, Appellees.

ON APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

Motion to Advance.

Henry H. Peck, sheriff of Windsor county, Vermont, and Wilson S. Lovell, superintendent of the Vermont state prison, Appellees in the above cause, move that this cause be advanced upon the docket of the court to be heard and argued at as early a date as can be fixed, convenient to the court.

Statement of the Case.

The appellant was indicted at the June, 1903, term of Bennington County Court, Vermont, for murder in the first degree, the specific charge being that she murdered her husband, Marcus M. Rogers, at Bennington, Vermont, on August 12, 1902, by administering chloroform to him. She was tried by jury upon said indictment, at the December, 1903, term of said Bennington County Court, and was found guilty of murder in the first degree, and thereupon was sentenced to suffer the punishment of death by hanging on the 3rd day of February, 1905, in accordance with the provisions of Vermont statutes, sections 4886 and 2010: the sentence further providing, as required by section 2007, Vermont statutes, that she be confined at hard labor in the state prison until three months before the time fixed for execution, and in solitary confinement in said prison from thence until the time of the execution; and she was committed to the state prison accordingly.

On February 1, 1905, the Governor of the State of Vermont reprieved the appellant until the 2d day of June, 1905, and on the 1st day of June, 1905, the Governor further reprieved her until the 23d day of June, 1905, and on the 22d day of June, 1905, the Governor further reprieved her until the 8th of December, 1905. On the 29th day of April, 1905, the appellant brought her petition to the Supreme Court of Vermont for a new trial on the ground of newly discovered evidence and alleged errors in her trial at county court. This petition was heard at the May, 1905, term of the Supreme Court of Vermont, and on May 30, 1905, judgment thereon was rendered by said court dismissing said petition.

On the 19th day of June, 1905, the appellant brought her petition to the Honorable District Court of the United States for the District of Vermont, for writ of Habeas Cor-

pus. The writ was issued by said court on the same day, and hearing thereupon had on June 21, 1905, and on June 22, 1905, the writ was dismissed and appellant remanded to her former custody, after which the last mentioned reprieve was granted; after the last reprieve an appeal to this court was allowed the appellant, to wit, on June 22, 1905.

The respondent, Peck, is the sheriff of the county of Windsor, upon whom devolves the duty, by the law of Vermont, of executing the sentence. The respondent, Lovell, is the superintendent of the Vermont state prison, and as such is the keeper of the appellant until she is taken by the sheriff for execution.

The principal allegations in the petition are that the reprieves granted by the Governor are illegal and that there is no warrant in law for restraining the appellant of her liberty under and by virtue of the reprieves, and that in so restraining her the appellees are depriving her of her life and liberty without due process of law and depriving her of the rights and protection guaranteed her by the Constitution of the United States:

Further, that when leave was granted, under section 1998 of Vermont statutes, to the appellant to file her petition to the Supreme Court of Vermont, for a new trial, the judges allowing the same made no order staying the execution of sentence until after the time fixed for hearing the petition, and that the Supreme Court of Vermont upon rendering judgment dismissing the petition for a new trial, did not appoint a time for executing the sentence, all of which, she alleges, is depriving her of life and liberty without due process of law, as contemplated by the Constitution of the United States:

Further, that at her trial at the Bennington County Court she was denied the right to cross examine a principal witness against her: Further that the Legislature of Vermont has provided no court of justice for trial of questions of law re-

moved from the county court in the county of Bennington; that the Supreme Court of Vermont sitting in general term is not such a court of justice for Bennington county and that the failure of the Legislature to provide a Supreme Court in Bennington county is depriving her of the privileges secured by the Constitution of the United States, and of her liberty and life without due process of law.

REASONS FOR THIS MOTION.

The appellees contend that no federal question is presented by the appellant in this case, and that due course of justice in the State of Vermont requires that it should be advanced and disposed of at the earliest reasonable time.

Further, that since under the revised statutes of the United States, section 766, any and every act under and by virtue of the laws and Constitution of the State of Vermont pending this appeal are null and void, the legality of any further reprieve by the Governor until this cause is disposed of is doubtful, and under section 2004 of the Vermont statutes no new sentence of death can be imposed to take effect until after the first day of January, 1907:

Therefore, if this cause is not heard and disposed of before December 8, 1905, there must result long delay in carrying out the penalty imposed by the law for the crime of which the appellant stands convicted.

CLARKE C. FITTS,
Attorney-General of Vermont,
For the Appellees.

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No. 368. October Term, 1905.

ON APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF FOR APPELLEES.

CLARKE C. FITTS,
Attorney General of Vermont.

Supreme Court of the United States.

No. 368. October Term, 1905.

Mary M. Rogers, Appellant,

vs.

Henry H. Peck, Sheriff of Windsor County,

and

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ON APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

Not having a copy of appellant's brief before us while preparing this brief, we are only able to argue upon the complaints made in her petition for the writ. We discuss those complaints in their order. References to the record are to the printed pages.

1.

The appellant complains that the Governor's reprieve is not authorized by law, and that she is, therefore, being restrained of her liberty without due process of law, and in violation of the Constitution of the United States.

a. *Is it a Federal Question?*

The power of the Governor of Vermont to grant reprieves is under section 11 of chapter 2 of the Constitution of Vermont, as amended by article 8 of the Articles of Amendment, and as so amended is in these words, in substance:—

> "The Governor shall have power to grant pardons and remit fines in all cases whatsoever, except in treason and murder; in which he shall have power to grant reprieves, but not to pardon, until after the end of the next session of assembly."

There is no statute of the state relating to the subject. The appellant's complaint that she is being held in violation of the fourteenth amendment is in itself of no consequence. Her mere averment that she is detained in violation of the Constitution and laws of the United States, and is restrained in violation of the Constitution of the United States is merely an averment of a conclusion of law and not of fact, and is not sufficient to give the court jurisdiction.

Sawyer vs. Piper, 189 U. S. 154.
Whitten vs. Tonlinson, 160 U. S. 231.
Craemer vs. Washington, 168 U. S. 124.
Ex parte Cuddy, 131 U. S. 280.
Kohl vs. Lehlback, 160 U. S. 293.

Her petition must set forth facts to make a basis for the allegation.

Is the reprieve under which she is now held "due process of law"? It is to be assumed that she was in the first instance tried, convicted, sentenced and committed to prison to await execution all by due process of law. Being so sentenced and committed and while awaiting execution, the reprieve is granted. The granting of a reprieve, under the Constitution of Vermont, is an executive function. It is favor to the prisoner.

In re Cross, 146 U. S. 277.

But for the reprieve she would have been executed on the day fixed by the sentence. It is not and cannot be in the very nature of things a judicial proceeding. It is an incident to or part of the power of pardon,

and is so classified in the Constitution. Capital punishment is the highest form of punishment known to law. Anything which delays or postpones such punishment is favor to the prisoner. To determine whether the granting of the reprieve is "due process of law," it is not for this court to inquire to what extent the Governor of Vermont has the power to reprieve, or what is the proper way for him to exercise it, or what is the proper form of the warrant of reprieve. Those are all questions for the state court alone to determine.

> "The Federal Constitution neither grants nor forbids to the governor of a state the right to stay the execution of a sentence." (Mr. Justice Brewer in Storti vs. Mass., 183 U. S. 141.)

The appellant complains that the reprieves were granted without her request or knowledge. Whether that is true or not is of no consequence; being a favor to her she cannot complain; but there is not in the Constitution nor in the statute any provision for notice or hearing on the question of reprieve, and there cannot well be. The exercise of the executive power in granting a commutation, respite, or reprieve not being in any sense a judicial proceeding, notice is not a matter of right. It rests wholly within the discretion of the power granting the favor.

It was held by this court in Holmes vs. Jennison, 14 Peters 598, that the legality of process issued by the Governor of Vermont, under the Constitution of Vermont, was for the state court alone to pass upon.

(See next to last paragraph of opinion of Mr. Justice Catron.)

The opinion of this court in Storti vs. Massachusetts, *Supra*, fully settles this question. In the case at bar, as in the Storti case, it is not stated wherein the reprieve is unlawful. From all the record shows, it is due process of law. The appellant, having been granted these reprieves, with the purpose, as is apparent, to enable her to test all her legal rights in the courts, now attacks the very power that granted her so great a favor.

In Lambert vs. Barrett, 159 U. S. 663, this court held that the question whether there was authority to issue a reprieve or death warrant was for the state court alone to determine.

b. *If the Question of the Reprieve is a Federal Question, is the Reprieve Lawful?*

The Constitution of Vermont containing the clause above cited, relative to the granting of reprieves, was adopted in 1793. At that time and from thence until 1842 there was no limitation upon the power of the court as to the date of execution of a prisoner sentenced to suffer capital punishment. Since 1842 the law of Vermont has been substantially the same as it now is, section 2004, Vermont Statutes.

> "No person sentenced to suffer the punishment of death shall be executed previous to the first day of January next after the close of the session of the General Assembly next following said sentence."

When this section was first enacted, sessions of the General Assembly were held each year, commencing on the first Wednesday in October. By the amendments to the Constitution adopted in 1870, the sessions of the General Assembly are biennial, commencing on the first Wednesday of October in each even year. The limitation to the executive power so that the reprieve can extend only until after the end of the next session of the Assembly, is plainly to be understood; with no limit, a reprieve might in effect be made a commutation, and the Governor is not given power to commute. The constitutional provision should receive a broad and liberal interpretation. The power is vested in the executive for use in emergencies. The courts take care of the legal rights of the accused, even to the extent of granting a new trial, on petition, at any time, for good cause shown. The Legislature exercises the power to commute or diminish the punishment. It is reasonable to suppose that the framers of the Constitution vested this authority in the Governor to use in just such cases as the one at bar, where it has been used, as is apparent, to give the appellant time to present her claims and test her rights before the courts. And the exercise of this power with that view requires only that the reprieves shall be for such length of time only, as in this case, as are necessary to give to the prisoner the time required to so test her legal rights.

She complains that she has had no hearing on the date to which the

reprieve should extend. She is not entitled to it, as it is not a judicial proceeding. The authority of the Governor to fix a certain date for the execution to take place is an incident to the power to grant reprieves.

State of New Jersey vs. Heller, 63 N. J. Law 105. (57 L. R. A. 312.)

The reprieve is not a new sentence, and the execution under it is not by way of a new sentence, but by reason of the expiration of a temporary suspension of the original sentence.

Ex parte Fleming, 60 Miss. 910.

There are no decisions of the courts of Vermont upon this question. If it be proper to refer to it, it may be said that long continued practice of the executive department of the state government has established this course of procedure. It was last exercised, we believe, by Governor Proctor, in the case of Phair in 1879, and the executive records show numerous instances of reprieves for a short length of time to expire sooner than the end of the next session of Assembly.

2.

No Stay of Execution Necessary on the Petition for New Trial to the State Supreme Court.

The appellant complains that the two judges of the Supreme Court of Vermont, who allowed her to file her petition for new trial to that court, erred in not making an order staying the execution of sentence until after the time fixed for hearing the petition in the Supreme Court. Vermont Statutes, section 1997, reads:—

> "When a prisoner is convicted of a capital offence and sentenced to be hung, he may bring petition for new trial at any time before execution," etc.

Section 1998 provides:—

> "Said petition shall be presented to two judges of the Supreme Court, who, upon examination thereof, shall determine whether it shall be filed and shall certify their determination

thereon; and if the petition is allowed to be filed, the judges shall make an order staying execution of sentence until after the time fixed for hearing the petition by the Supreme Court."

The appellant presented her petition to the two judges, Chief Judge Rowell and Judge Munson, on May 5, 1905. The then next term of the Supreme Court was to convene the second Tuesday of May, 1905. The appellant had been on February 1, 1905, reprieved by the Governor until June 2, 1905. There was no necessity for a stay of execution. And the Honorable Judges, in passing upon the allowance of the petition and certifying their determination thereon, expressly stated in their order the reason why they did not order a stay of execution. (See page 25 of record.)

It is apparent that the judges construed the word *shall* in the statute to mean *shall if necessary*, and that there was no necessity, and accordingly ordered no stay. Does the appellant claim that this is not due process of law? Upon whom devolved the duty of construing the statute, unless upon the two judges to whom she chose to bring her petition? We contend there is no reason for any other construction than the one those judges placed upon the statute. There is no reason for a stay except that the date of execution may be beyond the time fixed for hearing the petition. The appellant might have brought her petition a year before she did. In that case there would have been intervening three terms of the Supreme Court and a session of the Legislature before the date fixed for her execution. It would have been absurd for a stay of execution to have been granted then. The two judges acting upon her petition evidently understood that in the due course of procedure it would be heard and determined before the expiration of the reprieve. The record shows that it was so heard and determined. The cause was disposed of at the May term and the term ended May 31. (Pages 23 and 25.)

But all this is a question of procedure in the state court. In

Baldwin vs. Kansas, 129 U. S. 52,

in which case one of the errors assigned was that the jury were not sworn according to the form of oath prescribed by the statute of Kansas,

and that therefore the jury was not a legally constituted tribunal, and so that the defendant, under the judgment of the court, would be deprived of his life without due process of law, etc., this court said that the

> "Question whether the constitution of the State of Kansas was complied with or not in the proceedings on the trial, which are challenged, are not federal questions which this court can review."

And in

Lambert vs. Barrett, *Supra.*

the construction of the statute of the criminal procedure in the State of New Jersey, with reference to the constitution of the state, was before the court, and the appellant contended that the process under which he was being held, to wit, a death warrant, issued by the governor, was illegal, and that the appellant must be brought before the trial court and a new date fixed for the execution. This court held that all those were matters for the determination of the state courts, and the state court having passed upon the same adversely to the petitioner, the result involved no denial of due process of law or infraction of any provision of the Constitution of the United States.

> "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied." (Mr. Chief Justice Fuller in Leeper vs. Texas, 139 U. S. 462. Note also Hurtado vs. California, 110 U. S. 516.)

3.

FAILURE OF THE STATE SUPREME COURT TO APPOINT A TIME FOR EXECUTING THE SENTENCE.

All this is a matter of state procedure, as is settled by the cases already cited.

Lambert vs. Barrett, *Supra.*
Brown vs. New Jersey, 175 U. S. 174.
Baldwin vs. Kansas, 129 U. S. 57.

The statute under which the appellant makes this claim is Vermont Statutes, section 1999, which reads:—

> "When the trial upon petition does not take place until after the time appointed for execution, if a new trial is refused, the court hearing the petition shall appoint a time for executing the sentence and issue its order to the sheriff for that purpose."

It appears on the face of it that this law is not applicable to the petition of the appellant. The situation which must obtain before this statute can be invoked, never did obtain in her case. The trial upon her petition did not take place before the time appointed for execution. The time appointed for execution was the expiration of the Governor's reprieve, and that reprieve expired on June 2, 1905. Her petition had been heard and determined in the Supreme Court before that time. (See record, pages 23 and 25.) The word "appointed" does not mean the date of sentence fixed by the court in the first instance. The *appointed* date was the date upon which the event was to occur, and that was determined by the expiration of the reprieve.

A simple, commonsense construction of this statute shows that it means nothing else than that the court hearing the petition shall appoint a time for executing the sentence, *if necessary* to enable the court to properly dispose of the petition before the time of execution.

Mr. Justice White, in rendering the opinion in the case of Louisville & Nashville Railroad Company vs. Schmidt, 177 U. S. 230, said:—

> "It is no longer open to contention that the due process clause of the fourteenth amendment to the Constitution of the United States *does not control mere forms of procedure* in state courts, or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend." Citing

Ia. C. R. Co. vs. Ia., 160 U. S. 389.
Wilson vs. N. C., 169 U. S. 586.

The appellant complains in her petition that at her trial in the Bennington County Court, the principal witness against her was one Perham, and that Perham refused to submit to cross examination, and that his testimony was submitted to the jury without limitation or instruction from the court, on account of said refusal and lack of cross examination. She does not state how or wherein this is in violation of the Constitution of the United States. She says (page 3 of record) that by reason of her lack of mental capacity she did n't know or understand that it was unlawful and in derogation of her rights under the Constitution, but she does not say affirmatively that it was in derogation of her said rights. As has already been suggested, the court will not undertake to determine any other questions than those raised by the appellant in her petition. This whole matter relates only to the practice in the state court. The state has full control over procedure in its courts.

Brown vs. New Jersey, *Supra.*
Lambert vs. Barrett, *Supra.*
Baldwin vs. Kansas, *Supra.*

Any question relating to procedure in the state court cannot be raised by *habeas corpus.* A writ of error is the proper remedy to review judgments and practice of state courts.

In re Frederick, 149 U. S. 70-78.
Markinson vs. Boucher, 175 U. S. 184.
In re Schneider, 148 U. S. 162.
In re Duncan, 139 U. S. 479.

The record of the trial court is not here. The appellant has not seen fit to have it brought here. It may be proper for us, however, to examine the opinion of the Vermont Supreme Court in relation to this matter, and we call the court's attention to the case of Rogers vs. State of Vermont, 77 Vt. 454. This is the appellant's petition for new trial, referred to in the proceedings here. On page 461 the court refers to the cross examination of this witness, Perham. The full record was before this court, and, as is averred by the appellant, the opinion on this

petition for new trial was rendered by the learned judge who presided at the trial court, and this judge says in this opinion, referring to this witness:—

> "The witness was cross examined by the petitioner's counsel and in some respects made contradictory statements and some questions he did not answer, but regarding the particulars of the homicide and the part which he and the petitioner took in the same, his testimony in chief was not materially changed or shaken."

The question which the appellant undertakes to raise in this regard is absolutely frivolous.

5.

The appellant complains that her rights under the Constitution of the United States have been infringed because she has "been denied the right of appeal for a correction of errors of the trial court." She says there is no Supreme Court of the State of Vermont to which she has the right to appeal for a correction of the errors which she alleges occurred on her trial in County Court. This question as the appellant makes it, raises only the question of the Constitution of the State of Vermont, and the alleged collision of the state statute with the state constitution. It is not a federal question. The cases above cited are full authority on this point.

Baldwin vs. Kansas, *Supra.*
Brown vs. New Jersey, *Supra.*
Lambert vs. Barrett, *Supra.*
Porter vs. Foley, 24 How. 415.
Tuttle vs. R. R. Co., 168 U. S. 131.

But the point is not well taken in fact. The Constitution of the State of Vermont nowhere requires that a *Supreme Court* be maintained *in* each county. It refers to and provides for the election of judges of the Supreme Court. The only requirement in the present Constitution of Vermont (adopted in 1793) as to courts of justice in

each county is in section 4, chapter 2, which says, "Courts of justice shall be maintained in every county in this state," etc. This section was in substance embodied in the first constitution, adopted in 1777, and has always remained a part of the organic law of the commonwealth. For a time after the Constitution of 1777 was adopted, or until 1782, there was no Supreme Court. The Legislature of 1782 first established that tribunal. Act of June 21, 1782, section 7.

A Supreme Court Constituted.

> "And be it further enacted by the Authority aforesaid, That there shall be and hereby is constituted, a Supreme Court of Judicature within and for this State, to be held and kept annually, at the respective times and places in this Act hereafter mentioned, by one chief Judge and four other Judges, to be chosen by ballot, by the Governor, Council and General Assembly, annually, at their October Session, and commissioned for that purpose; any three of whom to be a quorum; who shall have cognizance of all pleas of the State, criminal actions and causes, and whatsoever relates to the conservation of the peace, and punishment of offenders, whether the same be brought into said court by appeal or any original process according to law."

The court so established, finally determined all questions as they arose on trial, the court sitting for trial of jury causes and having general jurisdiction and final determination of questions of law and effect. This judicial system obtained until 1797. By section 6 of Act No. 1 of the Acts of 1797, there was constituted a

> "Supreme Court of Judicature within and for the state to be holden at the respective times and *places* by law appointed for that purpose."

By section 1 of the same act there was constituted a County Court to be holden in each of the several counties of the state. The Supreme Court of Judicature, as provided in said section 6, had

"original and exclusive jurisdiction of all crimes and misdemeanors where the punishment extends by law to the loss of life, limb, or to disfranchisement."

The statute now in force, making death by hanging the punishment for murder in the first degree, has been the law of Vermont since 1787. So by this Act of 1797 the Supreme Court of Judicature had original and exclusive jurisdiction of this crime. The structure of the judicial system has been frequently changed by the Legislature.

Jurisdiction of the crime of murder was first given to the county courts by chapter 19 of the Public Acts of 1824, section 5 of which reads:—

"The several County Courts in their respective counties shall have original jurisdiction of all criminal matters of every name and nature arising within such counties, and award sentence on same."

Section 1 of the same Act reforms the structure of the Supreme Court of Judicature, and section 12 of the Act provides for taking all questions of law from the county court to the Supreme Court of Judicature by appeal.

Section 12:—

"All questions of law arising upon jury trials . . . . may pass to the Supreme Court for final decision."

Section 14 reads:—

"In all trials for capital offences there shall be present at least two judges of the Supreme Court to sit as judges upon such trial."

Act No. 40, of 1849, established a Supreme Court and Circuit Court. By said Act of 1849, causes arising in any county of the circuit might be heard in any other county of the circuit, if the Supreme Court so ordered. For section 7 of said Act of 1849 provides:

"That in addition to the sessions of the Supreme Court, now ordered by law, there shall be annually one session of said court in each judicial circuit."

And section 8:—

> "The Supreme Court at circuit sessions shall hear, try, and determine the business which may have been left unfinished at the preceding term of said court, in *each county* in said circuit."

The system established by the Act of 1849 continued until the passage of Act No. 1, of Acts of 1857, which abolished the Circuit Courts and provided for the Supreme Court and county court in each county. This remained the law until 1892, when the present judicial system was established. The law now is (section 994, Vermont Statutes):—

> "Three general terms of the Supreme Court for all counties shall be held as follows: On the second Tuesday in January, May, and October, of each year, at Montpelier, and special terms may be there held at such other time as the judges appoint. All causes on the docket of the court in the several counties shall be heard at such terms."

By section 993, Vermont Statutes:—

> "The Supreme Court has exclusive jurisdiction of writs of error to courts of inferior jurisdiction that may be necessary to the furtherance of justice and regular execution of the laws; and may try and determine questions of law removed from the county court, pursuant to law."

Vermont Statutes, section 1010:—

> "Each County Court shall have original jurisdiction in prosecutions for criminal offences within their respective counties . . . . and may award sentence according to law."

It will be seen from the foregoing that the structure and jurisdiction of the courts has been subject to legislative control all the time, and in the century and a quarter of the life of the commonwealth the power of the Legislature so to act has not been questioned.

Long ago the Legislature compelled residents of one county to go to another county to Supreme Court.

Act of November 4, 1800, section 1:—

> "The Supreme Court of Judicature shall not perform its circuit in the County of Essex until the same shall be directed by future act of the Legislature, but all causes proper to come before said court shall be entered, tried, and determined at their session at Danville, in the County of Caledonia."

The present statute has been passed upon by the Supreme Court of Vermont.

In Tucker vs. Eden & Lowell, 68 Vt. 168, a petition for laying of a highway in two towns situated in two counties, Lamoille and Orleans, was before the court upon a motion to dismiss. The petition was addressed to the "Supreme Court to be held at Montpelier, in the County of Washington, at its general term, May, 1896." The grounds for the motion to dismiss were: First, that the citation should have been signed by the clerk of the general term of the Supreme Court; second, that the petition should have been addressed to the Supreme Court for Lamoille County. The court held, Chief Judge Ross delivering the opinion, that the three general terms of Supreme Court were terms of the Supreme Courts for each of the counties.

> "They are not courts for the state as a single municipal corporation, but are general terms at which are held the Supreme Courts for the several counties which are included in the state. It is manifest from the language of the section, Vermont Statutes, 994 . . . . inasmuch as the Supreme Court in general term is the Supreme Court for the County of Lamoille, as well as for the other counties, ... the address in the petition and citation . . . . the latter being signed by the clerk of the Supreme Court for the County of Lamoille . . . . is for the Supreme Court of that county."

By section 1961 of Vermont Statutes:—

> "Questions of law decided by the county court, arising upon demurrer, trial by jury or motion in arrest, in a prosecution by indictment or information for a crime or misdemeanor,

shall, if verdict of guilty is returned, upon motion of the respondent, be allowed and placed upon the record; and the same shall thereupon pass to the Supreme Court for final decision. And judgment, sentence, and execution shall be respited and stayed in capital cases, and in other cases only at the discretion of the court."

If the Bennington County Court erred in any of its proceedings in the trial of the appellant, she had a right to exception, the right to take her case to the Supreme Court, which is established under the Constitution and laws of the State of Vermont for that purpose. By her petition for new trial she recognized the Supreme Court sitting in general term as the Supreme Court for Bennington County. The jurisdiction of the court is no stronger in case of a petition for new trial than in case of exceptions from the county court.

Baldwin vs. Kansas, *Supra.*
Lambert vs. Barrett, *Supra.*

The appellant complains that in Bennington County she has not the same right of appeal that the law secures to residents of Washington County in which is located the state capital, where the Supreme Court sits in general term. This is not true, since the Supreme Court is "for all the counties," as has appeared. But if it were so, it would not be a denial of the "equal justice" guaranteed by the fourteenth amendment. A state may provide one judicial system for one county and another for an adjoining county, so long as it does not abridge the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same county.

Missouri vs. Lewis, 101 U. S. 33.

It is not claimed that the appellant had anything less than all the protections afforded to citizens of Bennington County.

But if there is no Supreme Court for Bennington County, then Bennington County Court is the highest court in the State of Vermont in which the appellant's case could have been tried and determined.

Therefore, a writ of error might have issued from this court to the Bennington County Court. A writ of error issues from this court or from a judge thereof to the highest court of a state in which a determination of the case can be had. (Rev. Stats., section 709.)

In

Bergerman vs. Backer, 157 U. S. 655,

Mr. Justice Harlan said:—

> "If the proceedings in the court of oyer and terminer could not under the laws of New Jersey be reviewed in a higher court of that state, except upon the allowance of a writ of error by said court, or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the Acts of Congress, the judgment of the highest court of the state in which a determination of the case could be had. Such judgment could be had upon writ of error to be examined here, if it had denied any right or immunity specially set up and claimed under the Constitution of the United States."

Note also:—

Gregory vs. McVeigh, 22 Wall 294.
Fisher vs. Perkins, 122 U. S. 522.
Dunham vs. Alexandria, 9 Wall 659.
Miller vs. Joseph, 17 Wall 655.

The appellant complains that the Judge of the Supreme Court who presided at the trial in county court could not legally sit in the Supreme Court on the petition for a new trial.

The only statute relating to disqualification of a judge on account of having presided in the county court is section 1001, Vermont Statutes.

> "No judge shall sit at the trial of a cause in banc which he tried in the county court."

The cause tried in Bennington County Court was not the cause on trial in the Supreme Court. It was no ruling of Judge Watson that was before the Supreme Court to be passed upon. Therefore, it was

not only legal but entirely proper and right that he should sit on the petition for the new trial, for his familiarity with the trial in the court below naturally made him better able to understand the force of what was urged in behalf of the petitioner.

Is the Manner of Appellant's Confinement a Federal Question or Before This Court?

The appellant in her petition for this writ does not complain of the manner of her confinement. She complains that she is "held and detained" without due process of law; that she is "restrained of her liberty" in violation of the fourteenth amendment, but she nowhere alleges that she is in solitary confinement or has any time been so confined. As the record shows, the learned judge in the court below seems to have been somewhat troubled about this question of confinement, and in his opinion comments at length upon Medley's case, 134 U. S., and intimates that the reason for issuing the writ was the doubt which he entertained upon the question of solitary confinement. (See record, page 21.)

It is not the duty of this court to consider questions not raised by the appellant in her petition for a writ. The statute requires her to fully set forth the facts concerning her detention.

Revised Statutes, U. S., section 754.

It is not the duty of this court to go hunting for trouble nor to consider matters which appear in the record as mere surplusage or collateral to the questions raised by the petition. The reason for this is too apparent to need argument and the precedents too numerous to need citation.

In this connection it is well to consider the discussion of the principles governing the action of this court as stated in *ex parte Royall*, 117 U. S. 241, and in

Kohl vs. Lehlback, 160 U. S. 296.
Craemer vs. Washington State, 168 U. S. 124.

Section 2007, Vermont Statutes, which has been the law since 1878, provides:—

> "When execution is not to take place until after six months from date of sentence, the court at the same time shall sentence the respondent to hard labor in the state prison or house of correction until three months before the time fixed in the sentence of death for execution thereof, and shall also sentence him to solitary confinement in the state prison or house of correction from the expiration of the sentence to hard labor until the time of execution."

There is no definition of the term "solitary confinement" in the Vermont law, or in the decisions of the Vermont courts. The mittimus attached to the return of Appellee Lovell (page 15 of record) shows that the sentence imposed by the Bennington County Court upon the appellant is in conformity to the foregoing provision of the Vermont law.

The decision of this court in Medley's case, 134 U. S. 160, simply held that a statute passed after the commission of the crime of murder, which added to the punishment of death (that being the punishment when the crime was committed) the further punishment of imprisonment in solitary confinement until the execution, was, when attempted to be enforced against a convict so situated, an *ex post facto* law, and that the sentence inflicting both punishments was void. This case is fully discussed and distinguished in

McElvaine vs. Brush, 142 U. S. 155.

In the latter case it was contended that the solitary confinement provided for in the New York code constituted cruel and unjust punishment. But this court held that it should follow the adjudication of the highest court of a state in the construction of its own statutes.

There is no question of an *ex post facto* law in this case; the statute was in force long before the crime in question was committed.

The Governor's reprieves made no order and no regulation as to the manner of the appellant's confinement. There is no constitutional nor statutory provision for any such order or regulation in or as a part of

or incident to a reprieve by the Governor. The sentence was suspended. She was left where she was. No additional punishment was inflicted upon her. She can certainly have no more rights than in case of a sentence vacated and second sentence imposed. In such a case the infliction of solitary confinement by the second sentence has been held not to be in itself a distinct and separate punishment. It is made necessary by reason of the due and lawful proceedings in the case. This question is fully discussed by this court in

Murphy vs. Massachusetts, 177 U. S. 155,

to the effect that the additional solitary confinement made necessary by the second sentence, making in all a term of solitary confinement in excess of the statutory limit, is not in violation of the Constitution of the United States.

The Governor in his warrant of reprieve made no order or regulation as to the manner of appellant's confinement. Neither the Constitution nor the Statute of Vermont make any regulation in such a case. If then, the superintendent of the prison, in whose custody she was, held her in solitary confinement pending the reprieve, and if that solitary confinement was unlawful, that restraint was not an act of law, but the illegal act of the superintendent of the prison. The appellant's rights in the premises, therefore, would be against the superintendent. This court has nothing to do with the wrongs which may have been inflicted by an individual upon the appellant. It is only to inquire into what the *state* has done.

Murphy vs. Mass., *Supra.*
People vs. Trezza, 128 N. Y. 536.

The return of the Appellee Lovell, the superintendent of the prison, is a bit ambiguous, and in some particulars contradictory. It seems an amendment was added after his return was completed. (Pages 14 and 15, record.)

It appears from this return that the superintendent has held office only since April 1, 1905, and knows only from hearsay about the manner of the appellant's confinement before that day. Therefore, there is nothing properly before this court to show the manner of

confinement before April 1, 1905. The opinion of the learned judge of the district court hardly goes beyond this return.

In substance the return shows this: She has been kept in a room twelve feet square, with two outside windows, one with a view of quite a portion of State Street, in the Village of Windsor; has been visited by the matron of the prison a number of times a day, and on frequent occasions the matron has remained in the room visiting with the prisoner from a few minutes to as much as an hour at a time, and that the assistant to the matron has also frequently visited and conversed with the prisoner on an average of two or three times a day. That she has been visited by priest or chaplain at least once a week, by officers of the prison and county, and has had literature, magazines and periodicals, and occasionally a newspaper; and after June 10 all the time a female person as guard has been with her. And the superintendent in his return states that he understands such confinement to be solitary confinement according to the Statute of Vermont, and according to the rules and usages of the state prison.

This confinement is mild indeed compared to that in question in Medley's case. It ought not to be regarded as anything more severe than is required for the proper safeguarding of a prisoner under sentence of death with the date of the execution near at hand.

Is the Last Reprieve Legal?

The record shows (page 23) that in the court below, after writ was dismissed, and the appellant remanded to her former custody, and before an appeal was allowed and perfected, the Governor granted the reprieve, which expires December 8, 1905. The Revised Statutes, section 766, amended, 27 U. S. Stats. 751, makes null and void any proceeding against the prisoner in any state court or by or under the authority of any state pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein. The three "preceding sections" include Revised Statutes, section 763, the provision for an appeal from the final decision of any court inferior to the Circuit Court upon a writ of habeas corpus

issued in the case of any prisoner alleged to be restrained in violation of the Constitution of the United States. By an amendment to the statute (Sup. to R. S. of U. S., Chap. 517, Act of March 3, 1891, Sec. 5), appeal may be had from a district court direct to this court. Revised Statutes, section 765, provides that an appeal shall be taken on such terms and under such regulations and orders as may be prescribed by the Supreme Court. Rule 36 of this court prescribes the method for taking an appeal, and under that rule and the statute, the allowance of an appeal by the Circuit Court, the District Court or by some judge thereof, or of the Supreme Court, is necessary to the perfection of the appeal. And if an order of allowance is denied by the court, the party desiring to appeal must apply either to some of the other judges named, for the allowance, or to the Supreme Court for a writ of mandamus in aid of its appellate jurisdiction.

In re Durrant 84 Fed. Rep. 317.

The language of the statute, section 766 makes a distinction between the original proceeding and the appeal. It says, "Pending the proceedings *or* appeal." There was final judgment in the original proceeding when the court dismissed the writ and remanded the appellant to her former custody. Thereupon she was in the hands of the officers of the state and subject to full control of the state and its laws and proceedings. No "proceeding" was then "pending." Thereafterward there was nothing to stay the hand or the authority of the state until the appeal was allowed. A prayer for an appeal is not a proceeding pending within the meaning of the statute. It is the "pendency of the appeal" which stays the state authority. It is uniformly held that an allowance of an appeal is necessary to make it an appeal within the meaning of the statute.

Barrell vs. Transportation Co., 3 Wall 424.
Gleason vs. Florida, 9 Wall 779.
Railway Co. vs. Gude, 141 U. S. 244.

But this reprieve was not granted in defiance of the Federal Court or its authority. The purpose is apparent, and is as expressed by the learned judge of the court below in the final paragraph of his decision. (Page 23.)

It was granted to give the appellant sufficient time to have her appeal heard and disposed of in this court. It was the apparent purpose of the Governor to suspend the sentence by the reprieve for a time long enough so that no stay by the Federal Court would be necessary. It is in harmony with the proceedings in the Federal Courts, and its effect is simply to expedite the administration of justice in Vermont. Under section 2004 of Vermont Statutes, no sentence of death can be imposed to take effect until after the first day of January, 1907, for by that statute the date of execution must be fixed not earlier than the first day of January following the next session of the General Assembly. The next General Assembly meets in October, 1906. It is apparent that if a stay had been granted by the court below it would have made necessary the re-sentencing of the appellant, and consequently a long delay in carrying out the penalty imposed by the law for the crime of which the appellant stands convicted.

Habeas Corpus not Proper Remedy.

The appellant raised no question on the Federal Constitution in her trial in the county court. She made no motion in the State Supreme Court for a stay of execution nor to be re-sentenced. She has not sought relief in the state court for the alleged wrong she claims to be suffering, by being held under the Governor's reprieve. She should have first gone there for protection.

This court has repeatedly frowned upon attempts to use the writ of habeas corpus in place of a writ of error.

Chief Justice Fuller, delivering the opinion of this court *in re* Swan, 150 U. S. 637, said:—

> "The writ of habeas corpus cannot be used to perform the office of a writ of error or appeal."

Under the writ of habeas corpus, the court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact and pronounce them erroneous.

In re Frederich, 149 U. S. 70-78.
Ex parte Siebold, 100 U. S. 371.
Ex parte Curtis, 106 U. S. 371.
Ex parte Yarbrough, 110 U. S. 651.
Ex parte Wilson, 114 U. S. 417.
Ex parte Royall 117 U. S. 241.
Stevens vs. Fuller, 136 U. S. 468.

Where the validity of a sentence of a state court can be tested by the Supreme Court of the state or a writ of error from this court applied for, the United States District Court should not sustain a writ of habeas corpus to discharge the person convicted.

Pepke vs. Cronan, 155 U. S. 100, 101.

In rendering the opinion in this case, Mr. Chief Justice Fuller said:—

"It is insisted upon the argument that the judgment in contempt was not appealable (State vs. Davis, 2 N. D. 461), but it was conceded that the validity of the law and of the sentence could be tested by the Supreme Court of the state on certiorari or habeas corpus, and no reason was suggested why, if the judgment of the District Court was final judgment of the highest court of the state in which a decision of the matter could be had, a writ of error from this court might not be applied for.

"Without considering the merits of the questions discussed, the judgment must be affirmed upon the authority of

Ex parte Fonda, 117 U. S. 516.
Wood vs. Brush, 140 U. S. 278.
Cook vs. Hart, 146 U. S. 183.
New York vs. Eno, 155 U. S. 89, 90."

"The interference of the Federal Court is not demanded, particularly where the state court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. The state courts are as much bound as the Federal

Courts to see that no man is punished in violation of the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the state than by an interference which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there."

Davis vs. Burke, 179 U. S. 399.
Minnesota vs. Brundage, 180 U. S. 499, 505.

No Federal Question Raised.

We contend that there is not the semblance of an infringement of the appellant's rights under the Federal Constitution shown by any of the proceedings in her case. She has been subject simply and only to "due process of law" in the State of Vermont. The state has protected her by its constitution and its laws. It has granted her "equal rights" with all the other citizens of the commonwealth. Every opportunity has been afforded her to raise in the state courts all the questions she saw fit. She stands convicted and awaits execution because a jury of her peers have found her guilty and the laws of Vermont make her crime punishable by death.

The interference of the Federal authority in this case would, in effect, take from the State of Vermont the power to enforce its laws and protect its citizens. Broadly stated, if it is the duty of this court to grant the writ the appellant prays for, then it is its duty to put its hand upon all state procedure and to inquire minutely as to each and every step. It would reduce state authority to that of a mere minor civil division. The fourteenth amendment does not and never did mean anything of the kind.

Clarke C. Fitts,
Attorney General of Vermont,
For the Appellees.

Supreme Court of the United States.

No. 368.—October Term, 1905.

Mary Mabel Rogers, Appellant, vs. Henry H. Peck and Wilson S. Lovell. } Appeal from the District Court of the United States for the District of Vermont.

[November 27, 1905.]

Mr. Justice Day delivered the opinion of the Court.

The appellant, Mary Mabel Rogers, having been convicted and sentenced in the county court of Bennington in the State of Vermont of the crime of murder in the first degree, filed her petition on June 19, 1905, for a writ of *habeas corpus* against the sheriff and superintendent of the State prison, in the District Court of the United States for the District of Vermont. The petition, having been heard, was denied on June 22, 1905. From that order an appeal was taken to this court.

The conviction of appellant was had at the December term, 1903, of the Bennington County Court, and she was sentenced to be confined at hard labor in the State prison at Windsor until the third day of November, 1904, and on and after that day to be kept in solitary confinement until February 3, 1905, on which day she should suffer the penalty of death by hanging. On the first day of February, 1905, the Governor of the State of Vermont reprieved the execution of sentence until June 2, 1905. On April 29, 1905, the appellant presented a petition for a new trial to two judges of the Supreme Court of Vermont. On May 5, 1905, the judges made an order allowing the petition for new trial to be filed, and fixed May 10 for the hearing thereof. After hearing before the Supreme Court, sitting at Montpelier, Washington County, on May 30 an order was made dismissing the petition and refusing the new trial. (*Rogers* v *State*, 77 Vt. 454.) On June 1, 1905, the execution of sentence was further reprieved by the Governor until June 23, 1905. Thereupon appellant filed her petition in the Federal court for the writ of *habeas corpus*, which was dismissed, as heretofore stated. On the date of the dismissal of her petition (June 22, 1905) the Governor further reprieved the execution of the sentence until December 8, 1905. The appeal to this court was allowed on June 22, 1905. The petitioner (appellant) averred that, by the various proceedings in the State courts and her incarceration in the prison in solitary confinement, she has been restrained of her liberty and is about to be executed without due process of law, guaranteed for her

protection by the Fourteenth Amendment to the Constitution of the United States.

For the reversal of the judgment and order of the District Court of the United States, discharging the writ and remanding her to the custody of the Vermont authorites, appellant relies upon the following specifications of error:

"First. Because the petitioner was and is deprived of her liberty by the State, and subjected to the punishment of solitary confinement without any statute authorizing such punishment, and without any sentence of any court directing such punishment, and therefore without due process of law.

"Second. Because the Supreme Court of Vermont, having taken jurisdiction of the petition for a new trial, and having failed to comply with the requirements of law in respect of ordering a stay of execution and fixing the time for the execution of the petitioner, has failed to fix a day for the execution, and the Governor of Vermont has no right or authority to fix such a day, and the petitioner is being held to be executed in accordance with a precept not authorized by law, and which is not in and of itself due process of law.

"Third. Because the State of Vermont, having failed to maintain an appellate court in the county of Bennington, as required by its constitution, has deprived the relator of the opportunity to be heard by a court of competent jurisdiction, and thus deprived her of due process of law.

"Fourth. Because the Governor of Vermont, having issued his order requiring execution of the petitioner on December 8, while proceedings were pending in the courts of the United States for her relief on *habeas corpus*, said order of the Governor is to be deemed null and void, and the petitioner should be released from custody thereunder."

We shall notice these several assignments in the order named.

As to solitary confinement of the prisoner, it is not contended that she was not properly sentenced in this respect by the court of original jurisdiction. The statute of the State of Vermont (Vt. Stat. § 2007) provides:

"When execution is not to take place until after six months from date of sentence, the court at the same time shall sentence the respondent to hard labor in the State prison or house of correction until three months before the time fixed in the sentence of death for the execution thereof, and shall also sentence him to solitary confinement in the State prison or house of correction from the expiration of the sentence to hard labor until the time of execution."

The court in sentencing the appellant to be hanged on the first Friday of February, 1905, in pursuance of this statute, imposed a sentence of three months at hard labor until within three months of the time fixed for the execution, and three months of solitary confinement next before the day of execution.

The complaint in this behalf is not of a sentence alleged to have been imposed in violation of law, but because of the manner in which the appellant has been kept in confinement in prison after the original day fixed for the execution of the sentence. She alleges that she is suffering solitary

confinement without due process of law, within the meaning of the Fourteenth Amendment. If she is held in such confinement by the State authorities—which the record does not disclose, the confinement shown being close rather than solitary—we are of the opinion that no case within the Federal protection is made. *Medley's case* (134 U. S. 160) is cited, and relied upon by counsel. That case presented an entirely different question. It was there held that a sentence under a State law passed after the commission of felonious homicide, affixing the punishment of solitary confinement for a period of six months in addition to the death penalty, was an *ex post facto* law within the meaning of section 10, article 1, of the Federal Constitution, and therefore void. In *Rooney* v. *North Dakota*, (196 U. S. 319,) it was held that a statute which substituted close confinement in the penitentiary for a period before execution longer than had theretofore been authorized for confinement in jail, was not an *ex post facto* law. In the present case no sentence or law is being violated, and, assuming the appellant to be held in solitary confinement, there is nothing to prevent her having relief at the hands of the State authorities, and nothing to show that the appellant is being deprived of her liberty in violation of any right secured to her by the Federal Constitution.

The extent of the right of the Federal courts to interfere by the writ of *habeas corpus* with the proceedings of courts and other authorities of a State is carefully defined by statute. When a prisoner is in jail he may be released upon *habeas corpus* when held in violation of his constitutional rights. (Rev. Stat. § 753.) In the case before us, assuming for this purpose that the appellant has been properly convicted and sentenced of one of the gravest offenses known to the law, she is properly restrained of her liberty while in custody, for the purpose of making the sentence effectual. If her custodian is improperly restricting her freedom more than is necessary or legal under State law, there is no reason to suppose that the State authorities will not afford the necessary relief. And certainly there is nothing in this branch of the case to justify Federal interference with the local authority entrusted with the keeping of the prisoner.

The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted. (*Ex parte Reggel*, 114 U. S. 642; *In re Converse*, 137 U. S. 624; *Allen* v. *Georgia*, 166 U. S. 138; *Hodgson* v. *Vermont*, 168 U. S. 262; *Brown* v. *New Jersey*, 175 U. S. 172; *In re Frederick*, 149 U. S. 70.)

As to the second assignment of error, arising from the failure of the Supreme Court of Vermont to grant a stay and fix a time for execution of the sentence when it entertained and denied the petition for a new trial, at

the time of the ruling in this behalf the prisoner had been reprieved until June second. The decision was made before that day had arrived (May 30th). It is difficult to perceive any good reason for requiring the court to fix a time for sentence which was already definitely set by the reprieve of the Governor. It was the opinion of the Supreme Court of Vermont that it was not required to do so, and this decision cannot be reversed by Federal authority. It has been so frequently ruled by this court, that it is scarcely necessary to cite cases, that the Federal courts will not by writs of *habeas corpus* undertake to reverse the proceedings of the State courts, while acting within their jurisdiction under statutes which do not conflict with the Federal Constitution. (*In re Shibuga Jugiro*, 140 U. S. 291; *In re Wood*, 140 U. S. 278; *Andrews* v. *Swartz*, 156 U. S. 272.)

Whether, when the Governor had issued a reprieve which carried the date of execution beyond the time of decision in the Supreme Court, such action rendered unnecessary the fixing of a new day for execution, was purely a question of State practice, not controlled by the Federal Constitution or laws, and upon which the State court had final jurisdiction. (*Lambert* v. *Barrett*, 159 U. S. 660.)

As to the third assignment, that the State of Vermont had failed to maintain an appellate court in the county of Bennington as required by its constitution, and thereby deprived the appellant of an opportunity to be heard in review by a court of competent jurisdiction, the State has the right to determine for itself the courts in which crime may be prosecuted, and the appellate tribunals, if any, to which such causes may be carried for review. (*McKane* v. *Durston*, 153 U. S. 684, 687.) Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. (*Louisville & Nashville Railroad Company* v. *Schmidt*, 177 U. S. 230; *Wilson* v. *North Carolina*, 169 U. S. 586.)

The appellant had the right, by the laws of the State, to have a jury trial before a competent court. Upon exceptions, duly and seasonably taken for errors of law alleged to have occurred upon the trial, the appellant had a right to review in the Supreme Court (Vt. Stat. § 1961), whether this court should be held in each county or at the State capital for all the counties, is entirely a question of State procedure, presenting no Federal question for review here.

The fourth assignment of error calls for the consideration of sec. 766, Rev. Stat. of the United States, as amended. (27 U. S. Stat. 751.) This section provides in substance that any proceeding against a person imprisoned or confined or restrained of his liberty, in any State court, or by authority of any State, pending the proceedings or appeal in *habeas corpus*

cases in the Federal courts, and until final judgment therein, and after final judgment of discharge, shall be null and void. The contention for the appellant in this behalf is that the order further staying execution of the sentence by the Governor of Vermont, made on June 22, 1905, granting a reprieve until December 8 of the same year, was made pending the *habeas corpus* proceedings in the Federal courts, and is therefore void. The order of reprieve was made on June 22, the day upon which the writ was dismissed and appeal allowed to this court, just after the petitioner was remanded to the custody of the State authorities and very shortly before the appeal here was allowed. The power of the Governor of Vermont to grant reprieves in cases of murder is ample. (Constitution of Vermont, Chap. 2, § 11, Amendment, Art 8.) And such power is neither granted nor withheld by the Federal Constitution. (*In re Storti*, 183 U. S. 138.)

It is perfectly apparent that it was exercised in the present instance for the very purpose of permitting the prisoner to appeal to this court, and not to render ineffectual or in anywise interfere with the jurisdiction and orders of the Federal courts. Statutes should be given a reasonable construction with a view to make effectual the legislative intent in their enactment. The object of this statute is apparent. It requires the State courts and authorities to make no order and entertain no proceeding which shall interfere with the full examination and final judgment in a *habeas corpus* proceeding in the Federal courts, (*In re Shiboya Jugiro*, 140 U. S. 291,) and in no wise to interfere with the judgment if it shall result in a restoration of the petitioner's freedom when wrongfully imprisoned or restrained. The proceedings annulled are "against the person so imprisoned," etc. The statute aims to entirely prevent action which shall interfere with the perfect freedom of the Federal courts to inquire into the case and make such orders and render such judgment as they shall see fit.

The reprieve granted has had the effect doubtless intended by the chief executive of the State, to allow the cause to be heard upon appeal in this court. To denominate such an order a proceeding against the prisoner would do violence to the terms of the statute and defeat, not carry out, its purpose.

We are unable to find that the appellant has sustained any violation of rights secured by the Federal Constitution by the proceedings of the executive or judicial departments of the State of Vermont. The final order is affirmed, mandate to issue at once.